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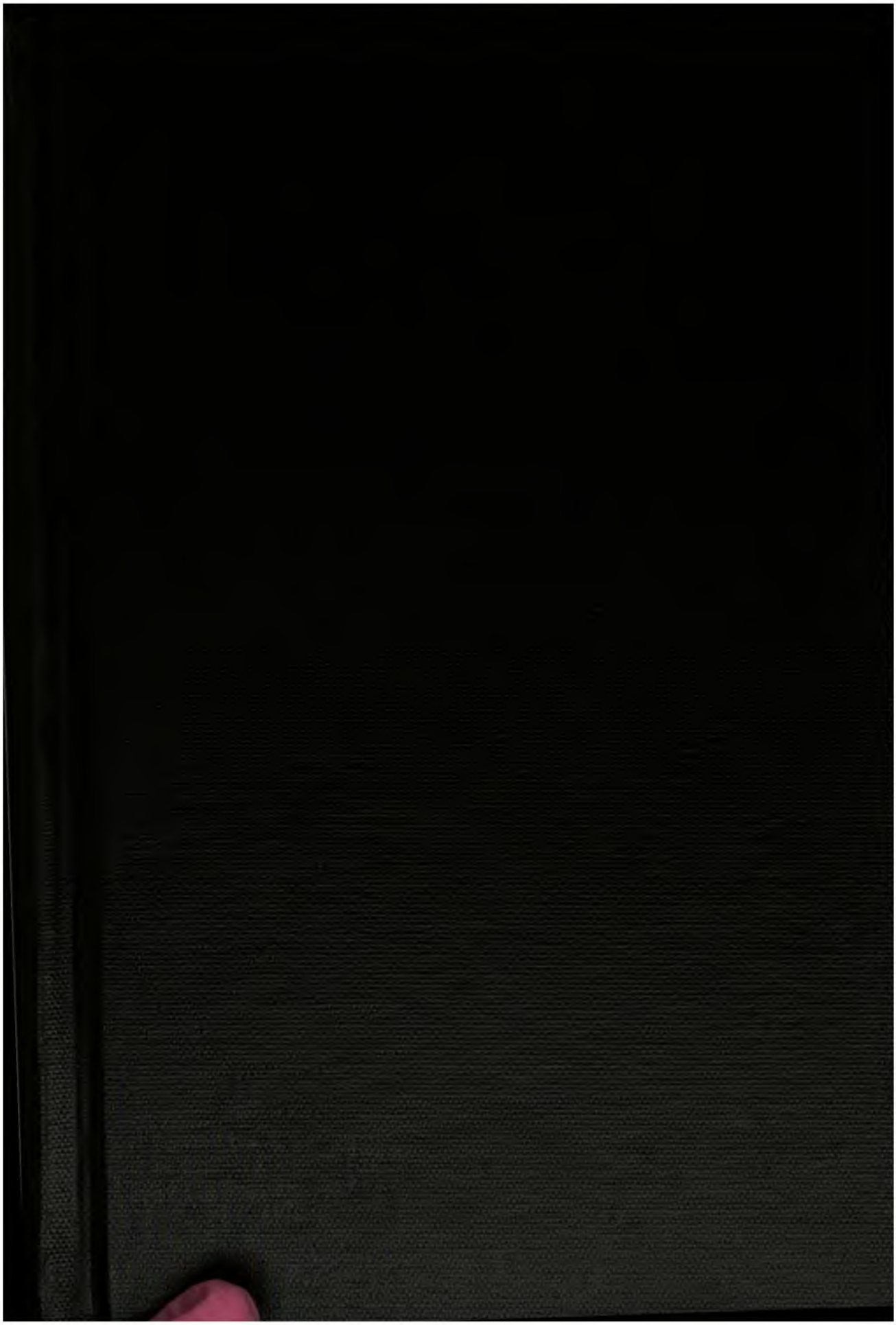

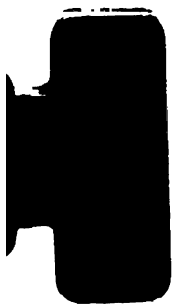

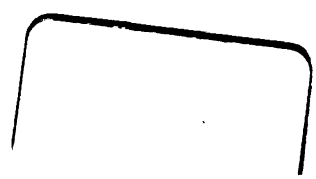

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A SELECTION OF CASES

ON THE

LAW OF BILLS AND NOTES

AND OTHER NEGOTIABLE PAPER.

WITH

FULL REFERENCES AND CITATIONS, AND ALSO AN INDEX AND SUMMARY OF THE CASES.

PREPARED FOR USE AS A TEXT-BOOK IN HARVARD LAW SCHOOL.

BY

JAMES BARR AMES,

BUSSEY PROFESSOR OF LAW IN HARVARD UNIVERSITY.

IN TWO VOLUMES.

VOL. II.

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CHAPTER VI.

OBLIGATIONS OF PARTIES TO BILLS AND NOTES.

SECTION I.

Acceptor and Maker.

ANONYMOUS.

IN THE QUEEN'S BENCH, EASTER TERM, 1705.

[*Reported in* 6 *Modern Reports*, 138.]

PER CURIAM. Interest upon a bill of exchange commences from demand made; and therefore, if there be no demand made until action brought, the defendant may plead tender and refusal, and *uncore prist*, and so discharge himself of interest; but, if it be the defendant's fault that demand could not be made, as if he were out of the kingdom, there want of demand ought not to prejudice the plaintiff.[1]

[1] Murray *v.* East India Co., 5 B. & Al. 204; *In re* Herefordshire Co., L. R. 4 Eq. 250 (*semble*); Bradford *v.* Cooper, 1 La. An. 325; Burton *v.* Chaney, 8 La. An. 338; Lancaster *v.* Carriel, 5 La. An. 147; Gantreau *v.* Verret, 11 La. An. 78; Bank of Charlotte *v.* Davidson, 70 N. Ca. 118; County of Beaver *v.* Armstrong, 44 Pa. 63; Emlen *v.* Lehigh Co., 47 Pa. 76, 83 (*semble*); Lang *v.* Brailsford, 1 Bay, 222, *accord.*

Francis *v.* Castleman, 4 Bibb, 282; Ash *v* Brewton, 1 Bay, 248; Collier *v.* Gray, Overt. 110, *contra.*

See also Kenner *v.* Peck, 2 La. An. 933; Conrad *v.* City Bank, 7 La. An. 4; Miller *v.* Bank of Orleans, 5 Whart. 503; North Pa. R. R. *v.* Adams, 54 Pa. 94.

Conf. Dent *v.* Dunn, 3 Camp. 296; Laing *v.* Stone, 2 M. & Ry. 561. — ED.

ANONYMOUS.

In the Common Pleas, Easter Term, 1788.

[*Reported in Practical Register*, 858.]

Action on a promissory note by the indorsee against the drawer: the defendant demurred, and showed for cause that no notice was alleged to be given to the drawer of the indorsement.

Belfield, for the defendant. Holmes *v.* Twist,[1] Henning's Case,[2] Lilly's Entries, 43, 44, 45, 78; Clift's Entries, 913, 914; Salk. 457; Lawtence *v.* Jacob.[3]

Curiam. This book is false, for the judgment was affirmed in B. R. There is no need of notice. *Judicium pro querente.*[4]

BARBER *v.* BACKHOUSE and Others.

At Nisi Prius, coram Lord Kenyon, C. J., Sittings after Easter Term, 1791.

[*Reported in Peake*, 61.]

Assumpsit on a bill of exchange. Brown, one of the defendants, had suffered judgment by default: the other defendants had paid £5 9*s.* into court.

As to the remainder of the money contained in the bill, they contended they were not liable. The case was as follows: the £5 9*s.* paid into court was the amount of the plaintiff's bill for business done as an attorney for all the defendants; the remainder of the money was for business done for Brown only. The bill was drawn by Brown on the partnership, and accepted by him unknown to the other defendants.

Law, for the plaintiff, contended that the £5 9*s.* paid into court could not be applied to any other count but that on the bill of exchange, for there was no count on an attorney's bill; and, if the bill was good for part, it was good for the whole.

[1] Hob. 51. [2] Cro. Jac. 432. [3] 8 Mod. 48.

[4] Lawrence *v.* Jacob, 8 Mod. 48; Skip *v.* Hook, Com. 563; Heald *v.* Johnson, 2 Smith, 44; Reynolds *v.* Davies, 1 B. & P. 625; Skelton *v.* Halstead, 2 Dowl. n. s. 69, *accord.* — Ed.

LORD KENYON declared himself to be clearly of a contrary opinion, and on this opinion a verdict was given for the defendant.

Law said he would look into the cases, and take the opinion of the court upon the case, if he found them favorable to him. He never moved the court for a new trial; but, upon Lord Kenyon in the next term mentioning this case in the course of argument, *Mr. Law* said he was perfectly satisfied with the decision.[1]

UPTON v. LORD FERRERS.

IN CHANCERY, BEFORE SIR RICHARD PEPPER ARDEN, M. R., FEBRUARY 23, MARCH 2, 4, 1801.

[*Reported in* 5 *Vesey*, 801.]

A THIRD[2] question was upon the rate of interest upon a promissory note, payable on demand. The Master had allowed only 4 per cent.

MASTER OF THE ROLLS. As to the question upon the interest of the promissory note, it ought to be 5 per cent. Nothing is more clear than that, where there is a written instrument promising to pay at a given day, interest is given at law by way of damages; or, where it is payable on demand, from the day of the demand. In a case[3] that was before me, I spoke to Lord Kenyon, and found it was so at law; and it would be ridiculous to have a different rule in this court. Therefore, 5 per cent must be allowed on this note from the time of the demand.[4]

[1] It is a familiar principle of the law of partnership that one who receives a partnership security for a private debt of one of the partners must prove at his peril that the security was given by the authority, express or implied, of all the members of the firm. Leverson *v.* Lane, 13 C. B. N. S. 278; Kendal *v.* Wood, L. R. 6 Ex. 243; 1 Lindley, Part. (3 ed.) 345; Story, Part. (6 ed.) § 133. In accordance with this principle, it may be doubted whether the defendants in Barber *v.* Backhouse, *supra*, could have been held liable for any thing in an action upon the bill itself, had they chosen to resist payment. But see Ellston *v.* Deacon, L. R. 2 C. P. 20. — ED.

[2] Only so much of the case is given as relates to this question.

[3] Parker *v.* Hutchinson, 3 Ves. Jr. 133.

[4] Cotten *v.* Horsemanden, Pract. Reg. 357; Blaney *v.* Hendricks, 2 W. Bl. 761 (*semble*); Lowndes *v.* Collens, 17 Ves. 27; *In re* Herefordshire Co., L. R. 4 Eq. 250; Vaughan *v.* Goode, Minor, 417; Ring *v.* Biscoe, 13 Ark. 533; Ziel *v.* Dukes, 12 Cal. 479; Dillon *v.* Dudley, 1 A. K. Marsh. 66; Patrick *v.* Clay, 4 Bibb, 246; Nelson *v.* Cartmel, 6 Dana, 7; Bank of Kentucky *v.* Thornsberry, 3 B. Mon. 519; Dodge *v.* Perkins, 9 Pick. 368, 386 (*semble*); Etheridge *v.* Binney, 9 Pick. 272, 279 (*semble*); Burnham *v.* Allen, 1 Gray, 496, 499 (*semble*); Scudder *v.* Morris, 2 Penningt. 318; Rogers *v.* Colt, 1 Zab. 19; Larason *v.* Lambert, 7 Halst. 254; Bank Commissioners *v.* Lafayette Bank, 4 Edw. Ch. 287; Rensselaer Factory *v.* Reid, 5 Cow. 587 (*semble*);

LAXTON v. PEAT.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JUNE 23, 1809.

[*Reported in* 2 *Campbell*, 185.]

ACTION by the indorsee against the acceptor of a bill of exchange.

The bill was drawn by one Hunt, and accepted for his accommodation by the defendant. The plaintiff gave value for it; but had notice of the circumstances of its original formation. When it became due, he received part payment from Hunt, and gave him time to pay the remainder, without the concurrence of the defendant.

N. G. Clarke, for the plaintiff, contended that the defendant was still liable for such part of the sum mentioned in the bill as remained unpaid. Although the drawer might be discharged by the holder's giving time to the acceptor, it had been decided that nothing would discharge the acceptor but satisfaction of the bill or an absolute renunciation of all claim upon him in respect of it.

LORD ELLENBOROUGH. This being an accommodation bill within the knowledge of all the parties, the acceptor can only be considered a surety for the drawer; and, in the case of simple contracts, the surety is discharged by time being given, without his concurrence, to the principal. The defendant's remedy over is materially affected by the new agreement into which the plaintiff entered with the drawer after the bill was due. The case is exactly the same as if the bill had been drawn by the defendant, and accepted by Hunt in consideration of a debt due. According to many authorities, the defendant, upon that supposition, would have been discharged, by the time given to Hunt;

Stowits *v.* Troy Bank, 21 Wend. 186 (*semble*); Purdy *v.* Philips, 11 N. Y. 406 (*semble*); Bishop *v.* Sniffen, 1 Daly, 155; Scovil *v.* Scovil, 45 Barb. 517; Herrick *v.* Woolverton, 41 N. Y. 581, 596; Lewis *v.* Lewis, 2 Hayw. (N. Ca.), 32; Atwood *v.* Bank of Chillicothe, 10 Oh. 526 (*semble*); Jacobs *v.* Adams, 1 Dall. 52; Breyfogle *v.* Beckley, 16 S. & R. 264; Estate of Bank of Pa., 60 Pa. 471; Cannon *v.* Beggs, 1 McC. 370; Schmidt *v.* Limehouse, 2 Bail. 276, *accord*.

In *In re* Herefordshire Co., *supra*, Lord Romilly, M. R., said, p. 253: "The only question is, whether at common law, when a banking company stops payment, you are entitled to claim interest according to the legal rate on the notes of the bank from the moment that it closes its doors, without making any demand for payment. I am of opinion you are not, and that you must present them in some way before interest can begin to run. It is quite clear that, in the case of a bill of exchange, you must do something equivalent to making a claim before you are entitled to any interest upon it. I am of opinion you must also do so in the case of a promissory note. These notes are payable on demand, and therefore you must demand payment of them." Conf. Taylor *v.* Mather, 67 N. Y. 87. — ED.

and the principle of these authorities applies with equal strength to the facts actually given in evidence. *Plaintiff nonsuited.*[1]

SANDERSON *v.* BOWES AND OTHERS.

IN THE KING'S BENCH, NOVEMBER 12, 1811.

[*Reported in* 14 *East*, 500.]

THE plaintiff declared in assumpsit upon a promissory note, as bearer thereof, against the defendants as the makers; and stated in his first count that whereas M. F. (one of the defendants), for himself and the other defendants, heretofore, to wit, on the 1st of September, 1808, at Workington, in the county of Cumberland, to wit, at London, &c., according to the form of the statute, made a certain note in writing, commonly called a promissory note, and thereby on demand promised to pay at the banking-house there, to wit, at Workington aforesaid, to one R. Nelson or bearer, the sum of £1 1*s.* value received; and the plaintiff afterwards, to wit, on the same day and year aforesaid, at London, &c., duly became, and before and at the time of the exhibiting of this bill was, and still is, the bearer of the said note; whereof

[1] Collott *v.* Haigh, 3 Camp. 281; *Ex parte* Glendinning, 1 Buck, 517; Lacy *v.* Lofton, 26 Ind. 324 (overruling Gordon *v.* Southern Bank, 19 Ind. 192); Adle *v.* Metoyer, 1 La. An. 254; Parks *v.* Ingram, 22 N. H. 283, *accord*.

In *Ex parte* Glendinning, Lord Eldon said, p. 518: "I perfectly remember when it was for the first time laid down in the courts of law that, where there was an acceptor without effects, notice of the dishonor of the bill need not be given to the drawer. This rule being once established, there naturally sprang out of it a new doctrine as to the respective liabilities of the drawer and acceptor in cases where the indorsee had notice that the acceptance was given merely for the purpose of accommodating the drawer. And the cases go the full length of determining that, as between the drawer and acceptor and indorsee, with notice, the drawer should be considered as the principal; and, if the indorsee give time to the drawer, that shall discharge the acceptor. These cases were shaken by the authority of Sir James Mansfield, which in this and in every other court is entitled to be received with the greatest respect. But I observe, in the printed report of the case, that not one of the numerous decisions of this court were called to that judge's attention. Now the practice is quite familiar in this court, where the indorsee, with notice of the accommodation transaction, has recovered upon the acceptance, to allow the acceptor to prove for the amount under the drawer's commission. I think this equity naturally grew out of the doctrine of not requiring notice to be given when the acceptor had no effects. Although no man more than myself laments the introduction of that doctrine, yet I cannot overturn what has been for many years acknowledged and acted upon as part of the general mercantile law of the country."

See Pooley *v.* Harradine, 7 E. & B. 431, 443. — ED.

the defendants afterwards, to wit, on the day and year aforesaid, at London, &c., had notice; by reason of which premises, and by force of the statute, &c., the defendants became liable to pay to the plaintiff the said sum of money in the said note specified, according to the tenor and effect of the said note. And, being so liable, the defendants, in consideration thereof, afterwards, to wit, at London, &c., undertook and promised the plaintiff to pay him the said sum of money in the said note specified, according to the tenor and effect of the said note. There were several other counts on similar notes, and also the common counts for money paid, money had and received, and upon an account stated; and then the declaration concluded: Yet the defendants, not regarding their said several promises and undertakings so by them in manner and form aforesaid made, &c., have not yet paid the said several sums of money, &c., to the plaintiff, although often requested; but the defendants to pay the same, or any part thereof, have hitherto altogether refused, and still do refuse, to the damage of the plaintiff of £30, &c. The defendants demurred generally to all the counts on the promissory notes, and pleaded the general issue to the money counts.

Richardson, in support of the demurrer. This case is not affected by the late determination of this court in Fenton *v.* Goundry,[1] which was the case of an acceptance; for an acceptance is no part of the original bill of exchange, the acceptor coming in collaterally to the bill, and being at liberty to accept it or not as he pleases. There is no decision of the court therefore on this point, and the only case that bears against the plaintiff is that of Wild *v.* Rennards,[2] where Bayley, J., held that, if a promissory note were made payable at a particular place, there was no necessity for proving that it was presented there for payment in an action against the maker; but it does not appear there that the place of payment was incorporated in the note. [BAYLEY, J. As far as I recollect, the place was not incorporated in the note, but was mentioned in a memorandum at the foot of it.] In Saunderson *v.* Judge, the principal point decided was that the note need not be presented to the party himself, but that a presentation at the place pointed out in the note as the place of payment was sufficient; and, as to what was said concerning the memorandum being part of the contract or not, it was extra-judicial. But there also it appeared that the place of payment was not incorporated, as here, in the body of the note, but in a memorandum at the foot of it. Other cases of this description were tried on the last Northern Circuit, some at Carlisle, and others at Lancaster, in all of which Wood, B., held that application for payment was necessary to be made at the place where

[1] 13 East, 459.

[2] Sittings in Hilary term, 1809, cited in 1 Camp. 425.

the notes were made payable. At Lancaster, he said that he had considered the subject again since the trial of the first cases at Carlisle, and was quite satisfied that application should be made at the place of payment mentioned. If it be considered on principle, there is nothing to prevent parties from making their contracts in what form they please, and the terms of them must be abided by. He then referred to a class of cases collected by Mr. Serjeant Williams, in a note on Birks v. Trippet,[1] where a distinction is taken between a promise to pay a mere duty upon request, which needs no actual request, and a promise to pay a collateral sum upon request, where there must be an actual request; but the court said that he need not labor that point. He observed that the principle of all those cases was that, where the request was part of the contract, it must be averred in the declaration, and proved. Here, then, it appears that a request of payment at the particular place named in the note is necessary to give the cause of action, because both the request and the place are part of the contract. A banker has a particular place where all his money is deposited, and where all his clerks are prepared to answer demands upon him; and there is no rule of law to restrain him from making his notes payable at that particular place, and not elsewhere. He cannot be prepared to pay all his notes at any other place where he may happen to be at the time, and the inconvenience would be excessive, if he were liable to be called upon elsewhere.

Holroyd, contra. Upon a contract of this nature, it is not necessary to allege any special request either as to time or place. The essence of the contract is a promise to pay the money everywhere, and the action itself is a sufficient demand. It may be admitted that this is distinguishable in the form of the contract from the late case of Fenton v. Goundry,[2] but it must be governed by the same principle. Would not an indorser upon default of the makers be liable to pay the note anywhere? The distinction is well taken in the cases referred to in the note in Saunders, that where a plaintiff sues for a duty, and not for a collateral sum, he need not allege a special request; but here the plaintiff sues, not for a collateral sum, but for a debt due; for it is expressed to be for value received: the party to whom the note is made payable might have brought an action for money had and received. Where an acceptor engages to pay money at a day certain, no special request is necessary to be alleged or proved; neither is it in the case of a drawer: why, then, should it be otherwise where the promise stated is to pay at a particular place? In the case of a bond, where a condition is stated to do a particular thing, the penalty is not saved by the obligee not having done something which he

[1] 1 Saund. 33. [2] 13 East, 459.

engaged to do, unless his omission obstructed the obligor, and prevented him from doing the act, and he did all he could towards the performance of it. The cases upon this subject are collected in 2 Com. Dig. tit. Condition, L. 4, 5. [BAYLEY, J., looking over the cases collected under the same title, G. 9, referred to one which says that, if a place certain be limited for payment, the party is not bound to pay it anywhere else.[1]] A tender and refusal are equivalent to payment against the suit of the party; but, where the obligation is to pay to a third person, a tender and refusal will not save the bond. If the obligor engage to go to a particular place to pay the money, he must go there with it, and the bond is not saved, if he do not, though the obligee were not at the place ready to receive it. If the condition of the bond be that the obligor will enfeoff the obligee of certain land on a particular day, it is not sufficient in an action on the bond for the obligor to say that the obligee did not attend at the day, but the obligor must show that he went to the land and executed the feoffment, and was ready to have delivered seizin, but that the obligee was not there to receive seizin. So, in covenant for non-payment of rent, the lessee may plead that he went on the land on the day, &c., ready to pay the rent, and that no one came to receive it on the part of the lessor. This, therefore, is at most matter of defence. Where a party promises to pay money at a particular place, he may not be bound to pay it elsewhere; but it comes properly by way of defence for him to show that he was ready at the time and place to pay the money, and that the plaintiff was not there ready to receive it. [LORD ELLENBOROUGH, C. J. Those are cases where money is to be paid, or something to be done at a particular time as well as place: therefore the party may readily make an averment that he was ready at the time and place to pay, and that the other party was not ready to receive it; but here the time of payment depends entirely on the pleasure of the holder of the note.] In 1 Roll. Abr. 433, l. 20, is a case of an engagement to deliver goods at Rotterdam upon request; and the court held that a request at Rotterdam was not necessary, but might be made elsewhere. This being a duty, no special request was necessary, but the action is a sufficient request; and there is a breach of the promise by non-payment on such demand. And, as to the place, it is matter of defence for the defendant to plead that he was always ready to pay at the banking-house at Workington. It is no part of the plaintiff's cause of action, which is the breach of the promise to pay the money, but a matter of defence to be pleaded, that the defendant was ready at all times at the place stipulated to make the payment. A plea of tender alone would not be sufficient in these cases without bringing

[1] For this is cited 1 Rol. Abr. 445, l. 52; 444, l. 7.

the money into court, which transfers the payment to another place. [It having been suggested that there was a general refusal alleged at the conclusion of the declaration, which might include a refusal at the banking-house at Workington as well as elsewhere, he observed that, there being no time or place alleged to such refusal, he could not, without a particular venue laid, argue that it was an allegation of a refusal to pay there. And Bayley, J., observed that a refusal alleged generally did not imply a refusal at the particular place.]

Richardson, in reply. The distinction taken in the cases between a promise to perform a duty (in which case the law raises the promise), and a collateral promise, does not apply to a case like this where there is a special contract; where the duty only results from the previous performance of certain acts by the party seeking to enforce it. A promise to perform a duty, where no request is necessary, is where, the consideration being executed, the promise is raised by law from the actual situation of the parties. [LORD ELLENBOROUGH, C. J. This is a duty created by the instrument itself, with certain limits and qualifications: the duty did not arise anterior to the instrument.] The holder must abide by the note itself, and that is formed upon a qualified promise. Cases on bonds are very different from the present: most of the instances are of bonds conditioned to do something at a particular time; but these notes come into the bank at all times at the pleasure of the holder, and the bankers are and can only be ready to pay them at the particular place. Where a contract is in its nature conditioned and qualified, the party availing himself of it must show that he has done all that lies on him to do by the terms of it. As to its being laid generally, that the defendants refused to pay; the mere omission is a refusal in law, and no proof of a special request. The application for payment at the banking-house is a condition precedent, the performance of which the plaintiff must show, otherwise his declaration is substantially bad, and may be taken advantage of on general demurrer. The cases are collected in the notes in 1 Saunders, 32; amongst others, Batch *v.* Owen [1] and Morton *v.* Lamb,[2] to which may be added Andrews *v.* Hopwood.[3] In the last of these cases, it was held, in an action against the drawer of a bill, that a demand at the particular place was a condition precedent; and that was in fact decided on general demurrer, because all the special causes of demurrer were overruled.

LORD ELLENBOROUGH, C. J. This case is materially different from that of Fenton *v.* Goundry, lately decided by this court; which was the case of a bill drawn generally, but accepted payable at a particular

[1] 5 Term Rep. 409. [2] 7 Term Rep. 125. [3] 2 Taunt. 61.

place; which special acceptance was considered merely as importing the intention of the party, that he would be found when the bill became due at that place as his house of business, where he should be prepared to pay it. There the acceptance payable at the place was no part of the original conformation of the bill itself; but here the words restrictive of payment at the place named are incorporated in the original form of the instrument, which alone creates the contract and duty of the party. This is not like cases cited of duties which are transitory with the person; but here the duty is to be performed and the money is made payable at a specific place, viz. the defendant's banking-house at Workington. Under such circumstances, a demand there by the holder is a condition precedent, in order to give himself a title to receive the money. Neither is it like the case of bonds with conditions, where the party is originally liable to the sum named in the bond; and he is to found his defence, and relieve himself against the payment of the penalty, by showing performance of the condition: that must come from him by way of defence; but here the defendant's duty was limited by the instrument itself, and nothing was demandable of him but upon the instrument. If the action for money lent or money had and received would lie merely upon the evidence of the note in question, let the plaintiff bring such an action; but this action upon the note will not lie, unless the plaintiff has demanded payment at the appointed place. And I cannot but say that it is very convenient that such a condition should be incorporated in the note itself; for it would be very inconvenient that the makers of notes of this description should be liable to answer them everywhere, when it is notorious that they have made provision for them at a particular place, where only they engage to pay them. Then if the request at the place be a condition precedent, it should have been averred, and for want of such an averment the declaration is bad. But I still think that this is distinguishable from the case of Fenton v. Goundry.

Grose, J. This is a promise to pay at the defendants' banking-house at Workington, but the defendants could not pay the note there, if the holder did not apply there for payment; and therefore the non-payment of it was the fault of the holder himself. The defendants only made a special engagement to pay the note at their banking-house, and they did not engage to pay it elsewhere: a request, then, was necessary to be made at the banking-house, to give a cause of action; and, there being no averment in the declaration that a request was made there, the action will not lie.

Le Blanc, J. The plaintiff had no other engagement with the defendants than upon this note, by which the defendants promise to pay so much on demand at Workington: there was no antecedent

duty owing from them, but their duty arises solely upon the instrument, and therefore the court must look at the instrument in order to see what that duty was. Now, by the terms of it, the holder of the note must bring himself to the place, and demand payment there, before he can entitle himself to receive the money: it is strictly, therefore, a case of a condition precedent, of which the plaintiff must aver performance, in order to bring himself within the defendant's promise, and is different from the cases on bond, where the party is to discharge himself from the penalty by showing performance of the condition; but here the plaintiff, not having entitled himself within the terms and meaning of the instrument upon which he sues, cannot recover.

BAYLEY, J. In the case of a bond, the defendant is liable to the debt, unless he bring himself within the saving of the condition: it lies, therefore, upon the defendant in that case to show that he has done all required by the condition in order to excuse himself from the penalty. But in assumpsit upon a contract the plaintiff must show that he has done every thing that lay upon him to do, in order to bring himself within the contract, and entitle him to sue upon it. Now, here the terms of the contract are a promise by the defendants to pay on demand at a certain place: then the plaintiff must bring himself within those terms, by showing that he made a demand upon the defendants at that place; and the defendants cannot be made liable beyond the terms of their contract, which is to pay at Workington. Where a person contracts generally to pay a sum of money, he is liable to the creditor everywhere; but where a person binds himself even by bond to pay at a particular place, then he is not liable at any other place, and the demand must be made upon him there. So here the defendants, having contracted to pay on demand at a particular place, are not liable but upon a demand at that place.

Judgment for the defendants.[1]

[1] Dickinson v. Bowes, 16 East, 110; Howe v. Bowes, 16 East, 112; 5 Taunt. 30, s. c.; Wallace v. McConnell, 13 Pet. 136, 147 (*semble*); Dougherty v. Western Bank, 18 Ga. 287, 295; Caldwell v. Cassidy, 8 Cow. 271, 278 (*semble*); Bank of N. Ca. v. Cape Fear Bank, 13 Ired. 75; Streater v. Cape Fear Bank, 2 Jones, Eq. 31; Wilks v. Robinson, 3 Rich. 182, 187 (*semble*); Armistead v. Armistead, 10 Leigh, 512, 523 (*semble*), *accord.*

Montgomery v. Elliott, 6 Ala. 701; McKenney v. Whipple, 21 Me. 98; Gammon v. Everett, 25 Me. 66; Haxton v. Bishop, 3 Wend. 13, 20 (*semble*), *contra.*

See Carley v. Vance, 17 Mass. 389, 391; Cook v. Martin, 13 Miss. 379, 393; Ware v. Street, 2 Head, 609. — ED.

PEARSE *v.* PEMBERTHY AND OTHERS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JULY 26, 1812.

[*Reported in* 3 *Campbell*, 261.]

THIS was an action against the makers of a promissory note, "payable at Were, Bruce, and Co's." Being presented there for payment when due, the answer was, "Not sufficient effects."

The only point made for the defendants was that they were entitled to notice of its dishonor. The place where it was made payable being, according to recent decisions, a material part of the instrument, it exactly resembled a bill of exchange, the bankers standing in the place of the drawees. Had it been a bill of exchange, the defendants were clearly entitled to notice; for they had some effects in the hands of Were, Bruce, and Co., and there was the same reason for their receiving notice, although the form of the instrument was different. They might suppose that the bankers would pay the note, and they ought as early as possible to have had the information that it would be necessary for them to provide for it themselves, and that their balance at the banking-house remained unappropriated. The necessity of notice to the maker of a promissory note of its dishonor results from the determination that his liability does not attach till payment has been demanded at the place where it is expressed to be payable.

But LORD ELLENBOROUGH clearly held that notice was unnecessary; and *The plaintiff had a verdict.*[1]

FENTUM *v.* POCOCK AND ANOTHER.

IN THE COMMON PLEAS, NOVEMBER 16, 1813.

[*Reported in* 5 *Taunton*, 192.]

THE plaintiff declared upon a bill of exchange drawn by Beazley upon the defendants, payable at three months after date to his own order, for £110, for value received by the defendants, and by the[2] drawer delivered to the defendants, which bill the defendants after-

[1] Smith *v.* Thatcher, 4 B. & Al. 200 (*semble*); Edwards *v.* Dick, 4 B. & Al. 212 (*semble*); Treacher *v.* Hinton, 4 B. & Al. 413; Benson *v.* White, 4 Dow, 334 (*semble*) *accord.* — ED.

[2] *Quære* the meaning of this averment.

wards accepted, to be paid when the same should become payable according to the tenor and effect thereof, at the house of Davison & Co., Pall Mall, and averred an indorsement and delivery by the drawer to the plaintiff, a presentment at Davison's for payment, when due, and a request made there of payment, and a refusal; and that neither the defendants nor any other person had paid it.

This cause was tried at the sittings at Westminster after Easter term, 1813, when it appeared that the bill was drawn by Beazley, and accepted by the defendants for his accommodation, and in order to enable him to raise money, without any consideration for the same, but that the plaintiff, to whom the drawer was indebted, took the bill without knowing that it was an accommodation bill, and gave value for it, having discounted it, received his own debt thereout, and paid over the balance to Beazley. When the bill became due, it was duly presented for payment, and refused; and the plaintiff was then informed that it was an accommodation bill, and that the defendants had no effects of the drawer. The plaintiff received from the drawer £65, in part discharge of the bill; and, upon his proposing to give a *cognovit* for the rest of the sum, payable at a future day, he hesitated to accept it until he should obtain the consent of the defendants, fearing lest the giving time to the drawer without their consent should operate as a discharge to them. That consent was asked by Beazley, and not obtained, but expressly refused. The plaintiff's attorney, however, was induced to accept the *cognovit*, upon an ambiguous representation by Beazley, either that he had obtained the defendant's consent, or that he had no doubt he should obtain it, the plaintiff's attorney swearing that he understood the result of the conversation in the former sense, Beazley swearing that he used only the latter expressions; but this was long subsequent to the defendant's refusal to pay, upon which the plaintiff's right of action, if any, became vested. Shepherd, Serjt., for the defendants, objected that, by giving time to the drawer of this bill, for whose sole accommodation it was accepted, the plaintiff had discharged the defendants. Mansfield, C. J., however, dissented from this doctrine; and the jury, under his direction, found a verdict for the plaintiff.

Shepherd, in Trinity term, 1813, had obtained a rule *nisi* to set aside this verdict and enter a nonsuit, upon the same objection which he had taken at the trial.

Marshall, Serjt., on this day showed cause. He observed that it was not made known to the plaintiff when he took this bill that it was an accommodation bill. He contended that the cases which would be cited were contrary to the general principles which had prevailed throughout all time respecting bills of exchange, and contrary to the

decision of Gibbs, J., in the case of Kerrison *v.* Cooke,[1] who expressed strong doubts of the doctrine now contended for, though he endeavored to distinguish the case then before him from the doctrine now impugned, upon the ground of a subsequent verbal promise by the acceptor to pay, yet that distinction had no sound foundation; for a verbal promise cannot add validity to a written instrument. The doctrine is also contrary to the case of Ellis *v.* Galindo,[2] where the holder gave the drawer three months' time, and did not sue the acceptor for three years afterwards. He also would have cited Dingwall *v.* Dunster,[3] and other cases, to show that an acceptor is in general liable in all cases; but the court said it was unnecessary.

Shepherd endeavored to support the rule on the argument that an accommodation bill varies from a bill given for value in this respect, that the drawer is the principal debtor, and the acceptor only a surety; whereas, in the ordinary case of a bill given for value, the acceptor is the principal debtor, and the drawer is only a surety. That this was an accommodation bill was a fact made known to the plaintiff before he gave time to the drawer. The plaintiff, therefore, by afterwards giving that indulgence to the principal, had discharged the surety. This had been expressly ruled by Lord Ellenborough, C. J., in the two cases of Laxton *v.* Peat and Collott *v.* Haigh.[4] Lord Eldon, C. J., in the case of English *v.* Darley,[5] recognizes this doctrine; for he says, "If a holder enter into an agreement with a prior indorser in the morning not to sue him for a certain period of time, and then immediately oblige a subsequent indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged this faith that he shall not be sued." [MANSFIELD, C. J. That decision would be right, if this new doctrine had never been received; for, as the acceptor had no effects in his hands, the drawer could not be hurt by the laches. Whatever could be got from the acceptor was all in ease of the drawer.] The holder, by giving time to the drawer, without the consent of the acceptor, puts the latter in a worse situation; for he cannot recover against the drawer until it is seen how much the holder may recover against the acceptor. It is only in case the holder should immediately compel the acceptor to pay the whole of the debt that the latter would be in a condition instantly to recover the whole against the holder. The court cannot sustain this verdict without holding that it makes no difference whether a bill be an accommodation bill or not, and that giving time to the drawer is no discharge of the acceptor.

MANSFIELD, C. J. No doubt, if the defendant can succeed in es-

[1] 3 Campb. 362. [2] 1 Doug. 250, *n.* [3] 1 Doug. 247.
[4] 3 Campb 281. [5] 2 Bos. & Pull. 61.

tablishing the principle that we must so subvert and pervert the situation of the parties as to make the acceptor merely a surety, and the drawer the principal, the consequence contended for must follow. This case of Laxton *v.* Peat certainly is the first in which it was ever supposed that the acceptor of a bill of exchange was not the first person and the last person compellable to pay that bill to the holder of it, and that any thing could discharge the acceptor, except payment or a release; and I never before knew that there was any difference between an acceptance given for accommodation and an acceptance for value. When I first saw that case in Campbell, I was in the same state as Mr. Justice Gibbs, and doubted a great deal whether it could be law. The case of Collott *v.* Haigh must be considered, not as a separate decision, but as resting on the authority of the former. It is utterly impossible for any judge, whatever his learning and abilities may be, to decide at once rightly upon every point which comes before him at Nisi Prius; and whoever looks through Campbell's Reports will be greatly surprised to see, among such an immense number of questions, many of them of the most important kind, which come before that noble and learned judge, not that there are mistakes, but that he is in by far the most of the causes so wonderfully right beyond the proportion of any other judges. But upon this case we think that we are bound to differ from him, and to hold that it is impossible for us to consider the acceptor of an accommodation bill in the light of a surety for the payment by the drawer, and that we cannot therefore say that he is discharged by the indulgence shown to the drawer. Certainly, the paying respect to accommodation bills is not what one would wish to do, seeing the mischiefs arising from them. One might find here a very important distinction between this case and the case decided by Lord Ellenborough; namely, that here the person taking the bill did not, at the time when he took it, know that it was an accommodation bill; and, if he did not then know it, what does it signify what came to his knowledge afterwards, if he took the bill for a valuable consideration? But it is better not to rest this case upon that foundation; for, as it appears to me, if the holder had known in the clearest manner, at the time of his taking the bill, that it was merely an accommodation bill, it would make no manner of difference; for he who accepts a bill, whether for value or to serve a friend, makes himself in all events liable as acceptor, and nothing can discharge him but payment or release. The case before Gibbs, J., has shaken this decision in Laxton *v.* Peat, and we think rightly. The case cited of English *v.* Darley is not applicable, where the giving time to an acceptor was held to be a discharge of an indorser, who stands only in the situation of a surety for the first. The rule, therefore, which has been obtained for setting aside the verdict and entering a nonsuit, must be discharged.

HEATH, J. Although I feel the utmost deference for the decisions of the noble and learned Lord, I cannot concur with him in these two decisions in Campbell. Whoever draws an accommodation bill, procures another to accept it, and negotiates it without letting the person to whom he passes it know it is an accommodation bill, is, as I think, guilty of a gross fraud. Shall the holder then be put in a worse situation by reason of the fraud which the drawer has practised on him? The courts have gone much too far in lending support to these mischievous instruments, the evils resulting from which we see every day. He who comes under the character of acceptor makes himself liable as such in all circumstances. Nothing can discharge him but payment or release. The rule must therefore be discharged.

CHAMBRE, J. The grounds have been fully and clearly explained upon which the court has decided. It is unnecessary for me to add any thing more than that I fully concur on all the points.

Rule discharged.[1]

HODGE *v.* FILLIS AND OTHERS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 11, 1813.

[*Reported in* 3 *Campbell*, 463.]

THIS was an action by the indorsee against the acceptors of a bill of exchange drawn in the following form: —

[1] Mallet *v.* Thompson, 5 Esp. 178; Kerrison *v.* Cooke, 8 Camp. 362 (*semble*); Raggett *v.* Axmore, 4 Taunt. 730 (*semble*); Carstairs *v.* Rolleston, 5 Taunt. 551; Price *v.* Edmunds, 10 B. & C. 584 (*semble*); Yallop *v.* Ebers, 1 B. & Ad. 703 (*semble*); Harrison *v.* Courtauld, 3 B. & Ad. 36; Nichols *v.* Norris, 3 B. & Ad. 41 n. (*semble*); Farquhar *v.* Southey, M. & M. 14; Strong *v.* Foster, 17 C. B. 201, 223 (*semble*); Manley *v.* Boycot, 2 E. & B. 46, 56 (*semble*); Pooley *v.* Harradine, 7 E. & B. 431, 448 (*semble*); *In re* Babcock, 3 Story, 393 (*semble*); Dibble *v.* Duncan, 2 McL. 553 (*semble*); Wilson *v.* Isbell, 45 Ala. 142; Cronise *v.* Kellogg, 20 Ill. 11; Lambert *v.* Sanford, 2 Blackf. 187; Anderson *v.* Anderson, 4 Dana, 852; Clopper *v.* Union Bank, 7 Har. & J. 101; Yates *v.* Donaldson, 5 Md. 389 (*semble*); Commercial Bank *v.* Cunningham, 24 Pick. 275 (*semble*). (But see Guild *v.* Butler, 122 Mass. 498, 501); Murray *v.* Judah, 6 Cow. 484, 492 (*semble*); Howard Co. *v.* Welchman, 6 Bosw. 280; Bank of Montgomery *v.* Walker, 9 S. & R. 229; 12 S. & R. 382, s. c.; White *v.* Hopkins, 3 W. & S. 99; Lewis *v.* Hanchman, 2 Barr, 416 (*semble*); Love *v.* Brown, 38 Pa. 307; Van Alstyne *v.* Sorley, 32 Tex. 518; Farmers' Bank *v.* Rathbone, 26 Vt. 19 (*semble*), *accord*.

In Price *v.* Edmunds, *supra*, Parke, B., said, p. 584: "I think that the decision in Fentum *v.* Pocock, where it was held that the acceptor of an accommodation bill was not discharged by giving time to the drawer, was good sense and good law." — ED.

"£2,314 15.11. CORK, 12 April, 1818.

"At 2 months' date of this our first of exchange (second and third of same tenor and date not paid), pay to our order £2,314 15*s.* 11*d.*, and charge the same to account as advised.

"W. & A. MAXWELL.

"To Messrs. Fillis & Co., Plymouth. Payable in London."

The bill was accepted by the defendants, "payable at Sir John Perring's & Co., Bankers, London."

The first count of the declaration did not state that the bill was made payable at any particular place either by the drawers or acceptors. The second count stated that it was drawn payable in London, and accepted payable at Perring & Co.'s, and contained an averment that, when due, it was presented there for payment. The plaintiff having proved the partnership of the defendants, their handwriting as acceptors, and the indorsement of W. & A. Maxwell, closed his case.

Giffard, for the defendants, contended that upon this evidence the plaintiff was not entitled to a verdict. He could not recover on the first count, for that did not properly describe the bill of exchange. The circumstance of the bill being made payable in London was an essential part of the original contract. The second count described the bill properly, but contained a material averment which had not been proved; viz., that the bill was presented, when due, at the bankers in London, where it was made payable by the acceptors. Without at all considering the effect of an acceptance making the bill payable at a particular place, where it was drawn without any mention of a place of payment, there could be no doubt that where a particular place of payment is denoted, both by drawers and acceptors, that becomes a term of the contract between the parties; and an averment that the bill was presented for payment there cannot possibly be rejected as irrelevant.

LORD ELLENBOROUGH expressed himself to be of this opinion.

The plaintiff's counsel then proved that after the bill was due one of the defendants promised to pay it, which Lord Ellenborough held dispensed with direct evidence of a presentment for payment at the bankers, and *The plaintiff had a verdict.*[1]

[1] Picquet v. Curtis, 1 Sumn. 478; Alden v. Barbour, 8 Ind. 414. (But see 2 G. & H. Ind. Stat. 107, § lxxxii.), *accord.*
Wolcott v. Van Santvoord, 17 Johns. 248, *contra.* — ED.

PIERSON v. HUTCHINSON.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JULY 7, 1809.

[*Reported in* 2 *Campbell*, 211.]

THIS was an action by the indorsee against the acceptor of a bill of exchange.

The *Attorney-General*, in opening the plaintiff's case, stated that he should not be able to produce the bill, as it had been lost; but he should prove that before the action was brought the defendant had been regularly called upon for payment, and had been offered an unexceptionable indemnity. According to the usage of merchants, he was thereupon bound to honor his acceptance in the same manner as if the bill had still remained in the plaintiff's hands, and had been actually presented to him in the usual form. It is laid down by Marius[1] that, when an accepted bill is lost, the party to whom it is payable should notify this to the acceptor; "and when the bill falls due, and the time is come for him to go for the money, the party which had accepted the bill is not freed from present payment of the money, because the bill is lost; for, though the accepted bill be lost, yet he that accepted it is not: neither must the acceptor think this to be a sufficient answer for him to say, Show me my accepted bill and I will pay you, and such like shams, merely to make use of the money a little longer time. He may, in case of obstinacy, be sued at law for the money without the accepted bill, and be forced to the payment thereof with costs and damages; and therefore, merely by reason of the loss of the accepted bill, he can have no just cause or plea to detain the money beyond the just time from the right party who should receive the same." Marius then goes on to say that for this purpose the party entitled to payment has only to give bond or other reasonable writing to the content and good liking of the party that did accept the bill, and such as in reason he cannot refuse, engaging to save him harmless from the accepted bill which is lost, and to discharge him from the sum therein mentioned against the drawer and all others in due form. Therefore, if it should appear in the present case that the indemnity offered was such as in reason the defendant could not refuse, the production of the bill would be dispensed with; and, the acceptance being proved by secondary evidence, the plaintiff would be entitled to a verdict.

LORD ELLENBOROUGH. If the bill were proved to be destroyed, I should feel no difficulty in receiving evidence of its contents, and

[1] Marius on Bills of Exchange, p. 19, fol. ed.

directing the jury to find for the plaintiff. Even on a trial for forgery, the destruction of the instrument charged by the indictment to be forged is no bar to the proceedings. I remember a case before Mr. Justice Buller, where the prisoner had destroyed a bank-note, he was accused of having forged, by swallowing it. He was acquitted on the merits; but the learned judge who presided held that he might have been convicted without the production of the bank-note, and this doctrine was approved of by the whole profession. Here, however, the instrument is not destroyed. It is lost after being indorsed by the payee. It may now be in the hands of a *bona fide* indorsee for value, who might maintain an action upon it against the defendant. This brings it to the indemnity. But whether an indemnity be sufficient or insufficient is a question of which a court of law cannot judge. There are *dicta*, to be sure, that upon the offer of an indemnity the indorsee of a lost bill may recover at law; but these are so contrary to the principles on which our judicial system rests that I cannot venture to proceed upon them. Since the plaintiff can neither produce the bill nor prove that it is destroyed, he must resort to a court of equity for relief.

The *Attorney-General* said they could show that the bill had been discounted for the defendant's accommodation, and that the money had come into his hands; but Lord Ellenborough observed that would not alter the case: for, if the plaintiff were allowed to recover on the money counts, the defendant might still be compelled to pay the same sum a second time to a *bona fide* holder of the bill.

Plaintiff nonsuited.[1]

[1] Dangerfield *v.* Wilby, 4 Esp. 159; *Ex parte* Greenway, 6 Ves. 812; Bevan *v.* Hill, 2 Camp. 381; Davis *v.* Dodd, 4 Taunt. 602; Champion *v.* Terry, 3 B. & B. 295; Chancy *v.* Baldwin, 1 Jones (N. Ca.), 78, *accord*.

Jones *v.* Fales, 5 Mass. 101; Freeman *v.* Boynton, 7 Mass. 486; Fales *v.* Russell, 16 Pick. 315; Almy *v.* Reed, 10 Cush. 421, *contra*, are overruled by Savannah Bank *v.* Haskins, 101 Mass. 370.

Conf. Bridgeford *v.* Masonville Co., 34 Conn. 546; Union Bank *v.* Warren, 4 Sneed, 167; Waters *v.* Planters' Bank, R. M. Charlt. 198; Robinson *v.* Bank of Darien, 18 Ga. 65.

By Stat. 17 & 18 Vict. c. 125, § 87, it is provided that "in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge, or a master, against the claims of any other person upon such negotiable instrument." See Aranguren *v.* Scholfield, 1 H. & N. 494; King *v.* Zimmerman, L. R. 6 C. P. 466; Redmayne *v.* Burton, 2 L. T. Rep. 324; M'Donnell *v.* Murray, 9 Ir. C. L. R. 495, for decisions under this statute.

There are similar statutes in many of the States in this country. — Ed.

"In Massachusetts a maker may be sued at law although the note is lost, McGregory *v.* McGregory, 107 Mass. 370; but the acceptor of a lost bill is liable only in equity, Savannah Bank *v.* Haskins, 101 Mass. 370."

NASH v. BROWN.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., TRINITY SITTINGS, 1817.

[*Reported in Chitty, Bills* (10*th ed.*), 53.]

A BILL of exchange had been accepted and given as a present to the payee, who indorsed it to the plaintiff for a small sum advanced to him; and LORD ELLENBOROUGH held that the plaintiff was only entitled to recover so much as he had actually advanced on the bill.

DARNELL v. WILLIAMS.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., TRINITY SITTINGS, 1817.

[*Reported in* 2 *Starkie*, 166.]

THIS was an action by the payee, against the acceptor of a bill of exchange, for £19 5*s*.

The plaintiff having proved a *prima facie* case, and shown that the defendant, after the bill became due, paid £10 upon it, and took the bill away with him, it was proved on the part of the defendant that, when the bill was tendered to the defendant for his acceptance, he said that he had agreed to accept a bill to the amount of £10 only, but that, upon the plaintiff's urging him to do it as a matter of accommodation to the plaintiff, he had accepted the bill in question. The sum of ten pounds had been paid into court.

LORD ELLENBOROUGH held that, although with respect to third persons, the amount of the bill might be £19 5*s*., yet, as between these parties, it was an acceptance to the amount of £10 only, and

The plaintiff was nonsuited.[1]

[1] The accommodating maker or acceptor of paper pledged by the party accommodated is liable only to the extent of the pledgee's claim against the pledgor. Citizens' Bank *v.* Payn, 18 La. An. 222; Hilton *v.* Smith, 5 Gray, 400; Atlas Bank *v.* Doyle, 9 R. I. 76. Similarly the pledgee cannot charge an acceptor or maker for value for more than the amount of his claim against the pledgor in cases where the acceptor or maker has injudiciously paid the bill or note to the pledgor after the time of pledging. Mayo *v.* Moore, 28 Ill. 428; Valette *v.* Mason, 1 Ind. 288; Sawyer *v.* Moran, 3 Tenn. Ch. 55. On the same principle, a note given by a principal as indemnity to his surety can be enforced only to the extent of the surety's payments. Cushing *v.* Gove, 15 Mass. 69; Little *v.* Little, 18 Pick. 426; Haseltine *v.* Guild, 11 N. H. 390; Osgood *v.* Osgood, 39 N. H. 209; Child *v.* Eureka Works, 44 N. H 354. — ED.

JONES AND OTHERS *v.* HIBBERT.

AT NISI PRIUS, CORAM BAYLEY, J., SITTINGS AFTER MICHAELMAS TERM, 1817.

[*Reported in* 2 *Starkie*, 304.]

THIS was an action by the plaintiffs, as the indorsees of a bill of exchange, against the acceptor.

The bill was drawn on the 2d of June, 1817, by Phillips & Co. on the defendant, for the sum of £415 17*s.* 6*d.*, payable to the order of the drawers, three months after date, and indorsed by Phillips & Co. to the plaintiffs.

It appeared that this bill had been accepted for the accommodation of Phillips & Co., and had been indorsed by them to the plaintiffs, who were their bankers, for value, and that the latter knew that the bill had been accepted for the accommodation of Phillips & Co. Phillips & Co. before the bill was due became bankrupts, and the cash balance with the plaintiffs was then £150, in favor of Phillips & Co., for which sum the assignees of Phillips & Co. had since brought an action against the plaintiffs.

On the part of the defendant, it was contended that the plaintiffs were not entitled to recover more than £265 17*s.* 8*d.*, which was the sum really due to them, as between themselves and Phillips & Co.

On the part of the plaintiffs, it was insisted that they were entitled to recover the whole amount of the bill, since they were liable to the assignees of Phillips & Co. for the balance of £150 in favor of Phillips & Co. at the time of their bankruptcy.

BAYLEY, J., was of opinion that the proper view of considering the case was to lay the bankruptcy of Phillips & Co. out of the question, since their assignees could not stand in a better situation than the bankrupts themselves. According to this view of the case, the plaintiffs could not recover more than £265 17*s.* 8*d.*, since that was the balance really due, as between the plaintiffs and Phillips & Co. If the plaintiffs had been entitled to recover the whole, the defendant would have been entitled to recover the amount against Phillips & Co.; and the latter again would have recovered the difference from the plaintiffs. To prevent circuity of action, the plaintiffs could have recovered no more than the balance due as between them and Phillips & Co. Upon this view of the case, he was of opinion that the plaintiffs were not entitled to recover more than the balance.

Verdict accordingly.

JOSHUA ROWE, Esquire, v. ISAAC YOUNG.

In the House of Lords, Trinity Term, 1820.

[*Reported in* 2 *Broderip & Bingham*, 165.]

The defendant in error was indorsee, and the plaintiff in error was acceptor of a certain bill of exchange, dated the 20th December, 1815, drawn by James Meagher, at Gosport, upon the plaintiff in error, at Torpoint, requiring the plaintiff in error, two months after the date of the bill, to pay to the order of James Meagher the sum of £300, value in account, which bill was accepted by the plaintiff in error, payable at Sir John Perring & Co., bankers, London, and indorsed by James Meagher, to the defendant in error; and which bill, when the same became due, was dishonored and unpaid. Whereupon the defendant in error, after the said bill was dishonored, commenced this action in the Court of King's Bench, and in Trinity term, 56 Geo. III., obtained judgment upon demurrer, against the plaintiff in error, as the acceptor of the said bill of exchange. The first count of the declaration in the action was framed upon the bill of exchange as above described; but the declaration likewise contained all the money counts, and concluded with the common breach. The plaintiff brought error returnable before the Lords in Parliament, and

The special error was that it was not stated, nor averred in or by the first count of the declaration, that the bill of exchange was ever presented for payment at the said Sir John Perring & Co.'s, at which place the said bill of exchange was, by the acceptance, made payable.

The defendant joined in error; and in Trinity term last and the subsequent vacation the case was argued by the *Attorney-General* and *Wilde*, for the plaintiff in error; and *Holt*, for the defendant in error.

On the conclusion of the argument, the Lord Chancellor desired to have the opinion of the twelve judges upon the four following questions: —

First, whether in this case the bill of exchange mentioned in the first count of the declaration being therein alleged to have been accepted according to the usage and custom of merchants, payable at Sir John Perring's & Co., bankers, London (that is to say), at the house of certain persons using in trade and commerce the names, style, and firm of Sir John Perring & Co., bankers, London, the holder was bound to present it to that house for payment, and to aver in the declaration that the same was presented to that house for payment?[1]

[1] This question Dallas, C. J., Burrough and Park, JJ., and Wood, B., answered in the affirmative; Abbott, C. J., Richards, C. B., Bayley, Holroyd, Best, and Richardson, JJ., and Graham and Garrow, BB., in the negative. — Ed.

Secondly, whether the said bill, having been so accepted as aforesaid, such acceptance is, in law, to be considered as a qualified acceptance to pay the same at the said house of Sir John Perring & Co., bankers, London; or as a general acceptance to pay the same, with an additional engagement or direction for payment thereof at that house.[1]

Thirdly, whether, if A. draw a bill upon B. in favor of C. for £100, and C. without the previous authority or subsequent assent of A. take an acceptance of the bill for the whole of the £100, but an acceptance qualified as to the time or place of payment, C. could, notwithstanding his taking such acceptance, maintain an action upon the bill against A.[2]

Fourthly, whether, if A. were debtor to C. in £100, previous to his so drawing upon B., in favor of C., to the amount of £100, C. could, upon A.'s refusing his assent to an acceptance, qualified as mentioned in the above question, maintain an action upon the original debt against A., without delivering to A. the bill so accepted, in case, at the time the bill was drawn, B. was also indebted to A. in a like sum of £100.[3]

There being a difference of opinion among the learned judges, they subsequently delivered their opinions on these questions *seriatim*;[4] and on the 17th July the Lord Chancellor[5] and Lord Redesdale expressed the following opinions.

The Lord Chancellor (after stating the record). My lords, the writ of error in this case brings before your lordships the question, whether it was or was not necessary, in the first count of the declaration, to allege or state expressly, or to allege or state in substance and effect, so that it might be collected from the first count of the declaration, that the bill had been presented and shown to the plaintiff, either when it became due and payable or before that time, or since that time, at Sir John Perring's & Co., bankers, London; and that

[1] Dallas, C. J., Burrough, Park, Richardson, and Best, JJ., and Wood and Garrow, BB., considered the acceptance to be qualified; Abbott, C. J., Richards, C. B., Bayley and Holroyd, JJ., and Graham, B., regarded the acceptance as general. — Ed.

[2] This question all the judges answered in the negative, so far as it related to an acceptance qualified as to the time of payment. Abbott, C. J., Richards, C. B., and Holroyd, J., made no distinction whether the qualification were as to place or time But the other judges considered that the holder did not discharge the drawer by taking an acceptance qualified as to the place of payment, unless the qualification could be said to be material; *i. e.*, to work injury or inconvenience to the drawer. — Ed.

[3] This question Abbott, C. J., Dallas, C. J., Richards, C. B., Bayley, Burrough, and Park, JJ., and Wood and Graham, BB., answered in the negative; Holroyd, Richardson, and Best, JJ., and Garrow, B., in the affirmative.— Ed.

[4] 2 B. & B. 180–283. — Ed.

[5] Lord Eldon.

question may be stated in another way, namely, whether this acceptance, as stated in the first count of the declaration, is to be taken to be a general acceptance, making the party accepting liable to pay everywhere; or whether there is (what in some cases is called an expansion of the undertaking, and in other cases is called an engagement or direction in addition to the general unqualified acceptance to pay) a direction and engagement to pay at Sir John Perring's & Co., thrown in for the convenience of both parties, but which the holder of the bill is not bound to attend to, unless he chooses; or, on the other hand, whether this, upon looking at the terms of the declaration, is what is in law called a qualified acceptance. And, my lords, undoubtedly, it is very fit this question should be brought before your Lordships; because the state of the law, as actually administered in the courts, is such that it would be infinitely better to settle it in any way than to permit so controversial a state to exist any longer.

It has been stated at the bar, and there can be no doubt that it has been there correctly stated, that the Court of King's Bench has been, of late years, in the habit of holding such an acceptance as this to be a general acceptance, with what the judges of that court call an expansion, or a direction, or an engagement, which introduces, not a qualified promise, but a sort of courtesy, a kind of accommodation between the parties, in addition to the effect of the general acceptance; to which accommodation or courtesy, however, they hold that the holder of the bill is not at all bound to attend. On the other hand, it has been stated to your lordships, and there can be no doubt of the fact, that the Court of Common Pleas is in the habit of holding that such an acceptance as this is a qualified acceptance, and that the contract of the party is to pay at the banker's; and of holding as matter of pleading that presentment at the place stipulated must be averred, and that evidence must be given to sustain that averment. It has been further represented that, although in the present state of the law, the principles of law, as applied to promissory notes and bills of exchange, are simple enough in common cases, the Court of King's Bench has held that, if a man promise to pay at a particular place by a promissory note (at the Workington bank, for instance), the presentment, which is in point of law a demand, must be made there, because the place stands in the body of the note, and, being in the body of the note, it is part of the written contract which must be declared upon, as it exists, and proved as declared; but that, in the case of bills of exchange, the same court has held that the place at which by its acceptance a bill is made payable is not in the body of the bill; and, not being in the body of the bill, the court has taken it for granted that it is not to be considered as being in the body of the acceptance,

a conclusion which it is extremely difficult, I think, to adopt; because it seems hard to say that combinations of various kinds may be infused into the acceptance (for example, qualification as to time, as to mode of payment, as to contingencies, upon which the acceptor will pay, and various other qualifications which will be found in the cases), which they unquestionably may be, notwithstanding the generality of the bill as drawn, but that, if the acceptance contain a qualification clearly and sufficiently expressed as to place, that qualification ought not to be introduced into the acceptance.

In addition to being told that the decisions of the Court of King's Bench upon bills of exchange cannot be reconciled with the decision of that court upon promissory notes, your lordships are told that the decisions of that court upon bills of exchange are not all consistent with each other. It is a little difficult to say that they are; but, undoubtedly, it may be represented as the opinion of that court in judgment that this species of acceptance is a general acceptance, with that kind of expansion, direction, or engagement to which I have been alluding. The Court of Common Pleas being of a different opinion, it is impossible, my lords, for any man to feel that he has incumbent upon him the duty of giving the best opinion which he can form upon a question, on which so many men of high professional character and great professional learning have differed, without giving that opinion with a good deal of diffidence; but he must remember that it is his duty to give his opinion, whatever it may be.

The first question is whether this is a qualified acceptance. Upon that question, the twelve judges have given your lordships their opinion, and a great majority of them are of opinion that it is a qualified acceptance. Some of the judges have given your lordships their opinion that it is a general acceptance with an expansion, direction, or engagement for the convenience of one or other of the parties, — which, one does not very well know; and that the acceptance meant that, if the holder chose to go to Sir John Perring's & Co., he would probably there get payment of the bill. Then, another question is this, supposing this to be a qualified acceptance, was it necessary to aver the presentment in the declaration, and to support that averment by proof? A great majority of the learned judges (including some of those who thought this a qualified acceptance) say that it is not necessary to notice it as such in the declaration, or to prove presentment; but that it must be considered as matter of defence, and that the defendant must state himself as ready to pay at the place, and to bring the money into court, and so bar the action, by proving the truth of that defence. Some of the judges, to whom I am alluding (having been most eminent in special pleading), deny this proposition, and say that the

plaintiff must declare upon the contract as it is, that he must make out his right to sue, according to that contract; and, if that contract engage for payment at Sir John Perring's & Co., he must state in the declaration that he has demanded payment at Sir John Perring's & Co.: in short, their opinion is that the plaintiff has no cause of action, unless he have performed his part of the contract.

I think, my lords, I may venture to state, upon the cases which I have taken a great deal of pains to search (for I hope I have read every case upon the subject), that a person may undoubtedly draw a bill of exchange, as we are in the habit of making a promissory note, payable at a particular place: the effect is that the acceptor of such a bill has promised to pay at that particular place, and that the drawer, on default of the acceptor, has promised to pay at that particular place; but there seems a great objection made to the doctrine that, if a drawer has drawn generally, the acceptor can accept specially. The question appears to me to be whether the acceptor has accepted specially; and I cannot imagine, if the contract of A. (he being the drawer) be general, how it is from thence to be reasoned that I, the acceptor, need not come under any engagement, unless I choose to come under the engagement proposed by A., and that I cannot qualify my acceptance, and say to the holder of the bill, it is very true the drawer has drawn upon me, and expects me to make myself liable generally; but that is not what I choose to do: if you will not take an acceptance from me, by which I can consult my own convenience, by telling you that I will pay you at a given place and time, you shall have none at all. Cannot an acceptor accept in a qualified way? That he can, is clearly established by cases which extend to almost every species of qualification; and unquestionably if the qualification as to place cannot be adopted by the acceptor, it must be on account of some circumstance which belongs to the place, and does not belong to the time or the mode of payment, or any other species of qualification whatever. My lords, I am ready to express my full assent to the doctrine that, where a bill is drawn generally (considering that as an address to the person who is to accept it generally, because it is drawn generally), it lies upon the acceptor, who says that he has accepted specially, to accept in such terms that the nature of his contract may be seen from the terms he has used, and that that may clearly appear to be a qualified acceptance, which he insists is not a general acceptance.

The first question, then, here, will be upon the words whether this is or is not a qualified acceptance. Now, my lords, I really do not know how it is possible to say that this is not a qualified acceptance: I mean independent of the cases which have been decided; because, if a man draw upon me who am living in London, and I say, I accept

according to the usage and custom of merchants, payable at my bankers, Child's & Co., London, I only desire to ask (putting the usages of merchants, and putting the effect of these cases out of the question for a moment) whether any man could read an acceptance of mine in these terms, and say that it was not only an acceptance of mine, payable at Child's where those funds would be which were to pay it, but that it was an acceptance by virtue of which (as is admitted by those who have argued about the convenience and inconvenience, and who have looked at the *argumentum ab inconvenienti*) the holder of that bill might arrest me, and hold me to bail in any part of the world. My lords, after revolving this question again and again in my mind, with the full consideration of what has been stated about the practice and contrary decisions, I cannot say that it was not the intention of the party who thus accepted to come under an engagement, which may be represented as an acceptance, to pay the bill at Sir John Perring's & Co., London.

Then, it is said that the word "accepted" forms the general engagement, and that the words "payable at Sir John Perring's & Co." cannot qualify and cut down the general engagement; and cases are then cited which maintain a distinction between words of qualification in the body of a note, and words of qualification in the margin or at the foot of a note; and there are cases maintaining the distinction that, if such words be in the body of the note, they form part of the contract; but, if they be at the foot or in the margin, they form only a memorandum. I do not mean to disturb these cases at all, but I do not understand how it is that from these cases it is to be inferred that, when I write the words "accepted, payable at a given house," the word "accepted" is to be taken to express the whole of my contract, and that, though the sentence is not complete till I write the whole, the latter part of it is not to be taken as part of the contract, but as a direction or expansion of the engagement. Your lordships have heard a great deal of this *argumentum ab inconvenienti;* but I cannot help thinking that this is a mode of reasoning which is not quite analogous to our usual modes of reasoning in the courts below on the question of what men are likely to do or not to do. The case is put in this way. Supposing bills were drawn on each of the twelve judges of England, just before they left town on the circuit, and they had accepted the bills, payable at their respective bankers, if it be law that such an acceptance renders them liable to pay anywhere, the holders of those bills might undoubtedly, if they pleased, arrest the judges at their respective circuit towns, a little to the inconvenience of the administration of justice. It is said no man would think of arresting the judges. My lords, I hope nobody would think

of arresting the judges; but I can feel for mercantile men just as well as I can feel for judges, and I can feel for men exposed to the inconvenience of demands upon them which are to be regulated not by their contracts, but by a construction being given to their contracts which they meant should be never given to them. My lords, in this very case (and it seems not to have been very much considered) the acceptor is at Torpoint; and, having his money in London, where it is usually demanded of him, he says, If you make your demand upon me here, I cannot pay you; but I have at Child's or Drummond's shop money to pay you, and you will be sure to find it there. Is it no matter of inconvenience that such a man may, from caprice, if you please (and we have heard of such things, as men through caprice refusing a tender of Bank of England notes, and so forth), be obliged to bring money from London; or is he to keep money in London and at Torpoint too, to answer the exigency of the demand, as it may happen to be made at the one place or the other?

My lords, there is another consideration which does not appear to me to have been so much attended to as it might have been, namely, that if I promise to pay at my bankers in London, and a man calls upon me to pay in Northumberland, it is not the same thing; for, looking at the demand as likely to be made at Child's shop, I send the money there, but, if I am to pay in Northumberland, there must be the exchange and remittance, and so on, backwards and forwards. But take the case of a gentleman leaving Calcutta, and coming to reside in London, who gives a bill of exchange in Calcutta, to be paid there, six months after he departs: he arrives in London, not bringing a shilling home to pay that bill, — he finds the bill sent home by another ship, and he is arrested the moment he lands. Is the sum which he is obliged to pay here the same with that which he would have paid there, and for paying which he had made preparation? Certainly not. It appears to me, therefore, that, even with respect to the value of what is to be paid, there is a most essential difference in the contract.

Then, it is said this will be extremely inconvenient; and it was with a view to see what the balance of convenience and inconvenience would be in that part of the case that I took the liberty, with your lordships' permission, to put the third and fourth questions to the judges. It is said this may vary the right of the holder, in respect of the drawer, unless he, the holder, give notice, and so forth, to keep his liability alive. My lords, the answer to that, as it seems to me, is this, that, if you once admit that a man may accept specially, it is the consequence of the law that these difficulties arise: if you will say that no man shall accept specially a bill which is drawn generally, that settles the question; but, if you say that the law is, — though a man

draw generally, the drawee may accept specially, — it is the consequence of the law which imposes duties upon the holder to give notice to the drawer to keep alive the drawer's liability, and that inconvenience certainly is not quite so large as if the acceptor refused to accept at all.

Then, it is said that this will impose great difficulty upon the indorsee, that a person sometimes becomes an indorsee before, and sometimes after acceptance: if he become an indorsee before, he may find a special acceptance when he expected to have a general acceptance: but then, when the bill is indorsed to him unaccepted, he does not know whether it will ever be accepted; and, if he do not know that it will be ever accepted, he cannot tell whether it will be accepted specially. He knows, therefore, at the time of taking that bill by indorsement, that he is to look out for such an acceptor as he can find. What is there inconsistent with the rule of law or convenience in this? I cannot see any thing.

It would be a very unnecessary fatigue to your lordships to go through the whole of this case from the beginning to the end. It does appear to me that no one can say, the case is settled in law: you must therefore go back to principle. If you go back to principle, and admit that a man may give a qualified acceptance, the question is whether this is a qualified acceptance, ay or no. If it be a qualified acceptance, if it be an acceptance where the contract of the party is to pay at Sir John Perring's & Co., then I state it to be in pleading settled matter that you must declare according to the contract, and that you must aver all that the nature of that contract makes necessary. If that be so, if it be a special contract, and if it be necessary for you to aver all which the contract contains, how can it be said that it is not to be shown in the nature of the demand, but that it must be left to be shown in the defence? It appears to me that this position cannot be maintained. My lords, with respect to the cases of bonds which have been cited, they differ altogether from a contract of this nature. You bring your action upon a bond for the penalty: it must, therefore, be a matter of defence to say that the bond would have been paid at a particular place, for that will be in the condition of the bond; when you pray *oyer* of the bond, you defend yourself by saying that you have performed that condition, and that therefore you are to be excused from the payment of the debt. These cases, therefore, have no application to the case before your lordships.

There is another set of cases, in which it is said that, if there be an antecedent debt, the acceptance must be taken to be general. Between the acceptor and holder, there is seldom an antecedent debt; there may be an antecedent debt between the drawer and acceptor of the bill: I

wish that there had been an antecedent debt in all cases, for accommodation bills have been the ruin of many; but, with respect to the acceptor, it is not true that he must be antecedently the debtor; and all the cases with respect to qualified acceptance show that: for a man may accept to pay half the bill in money, and half in goods; he may accept to pay out of the produce of a cargo consigned to him when that cargo comes to this country. When your lordships look to the situation of a consignee, you will find that his acceptance is always qualified. A ship's cargo comes from the West Indies, and the bill with it: the acceptance of such bill will be, of course, an acceptance to pay in London. In every view of this case, I take the liberty to state to your lordships as my opinion (certainly stating it with infinite diffidence, as I ought, recollecting that I am obliged to differ in opinion from those whose judgments no man can respect more than I do) that this is a contract to pay at Sir John Perring's & Co., which is not the contract stated in the first count of the declaration; for that count wants that averment; and the consequence is that the judgment of the Court of King's Bench must be reversed. I do not think that it will be of the least consequence to the commercial world; for it will be so easy to adopt forms of words which leave no doubt as to what is meant that I am perfectly sure, if there were any inconvenience arising from the decision, if your lordships think proper to make it, that those who do not wish to have the inconvenience have nothing to do but to use two or three words which will guard them from it. But the question is, What is the law of this day upon this contract, as set forth in this first count of this declaration? I have already stated to your lordships in a few words what my opinion is, and I sincerely believe it to be founded in clear principles of law; although, when I state that I do believe it to be so founded, I cannot but recollect (and I do that with infinite respect) that I am differing in opinion with those whose opinion is infinitely superior to mine. But my duty is not to state their opinion, but to express my own.

Lord Redesdale. My lords, I most fully concur in the opinion expressed by my noble and learned friend. It does appear to me that some of the learned judges have totally forgotten acceptances for honor. If a person accept for the honor of the drawer, payable at a banker's in London, all the reasoning founded on the supposition that the acceptor must be debtor to the drawer vanishes; and I do not observe that the learned judges distinguished between the case of an acceptance for honor and the case of a common acceptance. It is impossible to say, if these words were applied to an acceptance for honor, that any of the arguments founded on the supposed prior debt of the acceptor could be maintained.

But, my lords, another part of the question which has been adverted to by the noble and learned lord appears to me of infinite importance: I mean the acceptance of a bill payable at a place different from the residence of the acceptor. This bill is accepted by a man resident at Torpoint, payable in London, at a certain banking-house. What is asserted to be the effect of this acceptance? That he engages to have money both at Sir John Perring's & Co. and at his own residence at Torpoint. If he accepted simply, he would engage only to have the money at Torpoint; but it is said that, because he accepts with this addition, he engages to have the money at both places. This is making him engage for two things instead of one, and it does seem to me that it must have been his intention to engage for only one, namely, a payment in London; for it is perfectly clear that payment at Torpoint and payment in London are two different things; and, if he be liable to be called upon at both places, his liability is rendered more inconvenient.

This might be converted into a most fraudulent transaction, in reference to dealings between mercantile people residing at different places. Take the case alluded to by the noble and learned lord, of a bill accepted payable at Calcutta. Suppose that a person accepts a bill payable in India, and leaves funds for the purpose of answering that bill, the bill being payable in six months: he comes to London, and there the bill is demanded of him because his acceptance is general, and the words "payable at Calcutta" do not qualify that acceptance. The consequence of that would be that the holder of the bill would gain the whole expense of the remittance from India to England, and we know perfectly well that that makes a very considerable difference. In an appeal very recently before your lordships, it was a question whether in an account of that description the expenses of remittance from India to England are or are not to be allowed; and it is part of the subject of appeal from a decision of the Court of Session in Scotland that the appellant has not been allowed the expense of that remittance. It appears to me, therefore, that it is perfectly clear that, if it were to be held that the acceptance of a bill payable at a different place is not to be held to be conditional acceptance, it may be used for the purposes of extreme fraud, to make a man pay that which he did not mean to pay, and which the drawer did not expect him to pay in such a mode. Many cases might be put as to the West Indies and other places which were attended to by some of the learned judges, and into which it is not necessary to enter. If the words which have been added to this acceptance be construed as having no operation in favor of the acceptor, how came they to have any operation whatever in favor of other parties? If they be not a condition annexed to the

acceptance, how can it be granted that the holder of the bill must, in order to entitle him to make a demand either against the drawer or against the indorser, show the bill to Perring & Co.? But it is said that this should be shown in the plea: the majority of the judges have been of opinion that it is a qualification of the acceptance, but that the party is to take advantage of it in pleading. But, in order to do that, he is obliged to bring the money into court; that is to say, he is to do the very thing which (in the case of an acceptance in India, for instance) he ought not to be obliged to do, for in that case the acceptor must bring the money from India, to be enabled to bring the money into court. Upon these grounds, it appears to me that it is infinitely better to hold that these words do amount to a qualification of the acceptance imposing a precedent condition which must be shown upon the record, for the purpose of setting forth truly the acceptance; and, that being set forth, it appears to me that the party is bound to prove that which he has averred in the declaration, which goes to show that the party taking such acceptance has complied with the condition entered into between him and the acceptor. On these grounds, I perfectly concur with the noble and learned lord that the judgment should be reversed. *The house accordingly reversed the judgment.*[1]

[1] Callaghan *v.* Aylett, 3 Taunt. 397; Gammon *v.* Schmoll, 5 Taunt. 344; Garnett *v.* Woodcock, 1 Stark. 475 (*semble*), *accord*.

Smith *v.* De la Fontaine, Bayley on Bills (3 ed.), 129; Lyon *v.* Sundius, 1 Camp. 428; Fenton *v.* Goundry, 13 East, 459; Wallace *v.* McConnell, 13 Pet. 136 (*semble*); Foden *v.* Sharp, 4 Johns. 183; Blair *v.* Tennessee Bank, 11 Humph. 84 (*semble*), *contra*.

See Benson *v.* White, 4 Dow, 334; Sebag *v.* Abitbol, 4 M. & Sel. 462.

By Stat. 1 & 2 Geo. IV. c. 78, § 1, "If any person shall accept a bill payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed, to all intents and purposes, a general acceptance of such bill; but if the acceptor shall in his acceptance express that he accepts the bill payable at a banker's house or other place *only*, and *not otherwise* or *elsewhere*, such acceptance shall be deemed to be to all intents and purposes a qualified acceptance, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payments shall have been first duly demanded, or such banker's house or other place." See Turner *v.* Hayden, 4 B. & C. 1; Walter *v.* Cubley, 2 Cr. & M. 151; Halstead *v.* Skelton, 5 Q. B. 86; Higgins *v.* Nichols, 7 Dowl. 551; Blake *v.* Beaumont, 1 Dowl. N. S. 697, decided under this statute. — ED.

THORPE ET UXOR v. BOOTH.

AT NISI PRIUS, CORAM ABBOTT, LD. C. J., MAY 22, 1826.

[*Reported in Ryan & Moody*, 388.[1]]

THIS was an action against the maker of a promissory note. The defendant pleaded the general issue and the Statute of Limitations. The note had been given to the plaintiff's wife before her marriage. The following is a copy of the note: —

"MARCH 12, 1813.

"Twenty-four months after demand, I promise to pay my sister Frances Booth the sum of seven hundred pounds.

"JOSEPH BOOTH."

The note was presented for payment on the 28th of June, 1823.

Scarlett, for the defendant, contended that he was entitled to a verdict, as no evidence had been given by the plaintiff, to take the case out of the statute. In Christie v. Fonsick,[2] Mansfield, C. J., is said to have held that, on notes payable on demand, the statute runs from the date of the note, and not from the time of the demand.

Gurney, and *H. I. Stephen*, for the plaintiff, contended that it was unnecessary to give any such evidence, as the cause of action did not accrue until twenty-four months after demand made; and no demand was made upon the defendant until June, 1823. They cited Holmes v. Kerrison[3] as an authority.

ABBOTT, LD. C. J. This is certainly a point of some doubt and difficulty; but I am of opinion, on the authority of Holmes v. Kerrison, that the Statute of Limitations will not in the present case be a bar to the plaintiff's right to recover on this promissory note. But that my opinion, if wrong, may be corrected, I shall give the defendant liberty to move to enter a nonsuit. *Verdict for the plaintiff.*

In the following Trinity term, Scarlett moved for a rule to show cause why a nonsuit should not be entered, but the court refused the rule.[4]

[1] Thorpe v. Coombe, 8 D. & Ry. 347, s. c. — ED.

[2] Selw. N. P. 361, 6th ed. [3] 2 Taunt. 323.

[4] Waters v. Thanet, 2 Q. B. 757, 769 (*semble*); Chase v. Evoy, 49 Cal. 467; Little v. Blunt, 9 Pick. 488, 491 (*semble*); Wenman v. Mohawk Ins. Co., 13 Wend. 267 (*semble*); Howland v. Edmonds, 24 N. Y. 307, 309 (*semble*); Bruce v. Tilson, 25 N. Y. 194, 198 (*semble*); Taylor v. Witman, 8 Grant, 188; Girard Bank v. Bank of Penn, 39 Pa. 92, 100 (*semble*); Finkbone's Appeal, 86 Pa. 368, 369 (*semble*), *accord*.

Palmer v. Palmer, 36 Mich. 487, *contra*. — ED.

SELBY *v.* EDEN.

IN THE COMMON PLEAS, JUNE 10, 1826.

[*Reported in* 3 *Bingham*, 611.]

THE plaintiff declared that one N. Atcheson, by his bill of exchange, required the defendant three months after date to pay to the order of N. Atcheson in London £498 15*s.*, which bill the defendant at London accepted according to the usage and custom of merchants; that Atcheson indorsed the bill at London to the plaintiff, of which indorsement the defendant at London had notice, by reason of which the defendant became liable to pay the plaintiff the amount of the bill, according to the tenor of the bill and of his acceptance.

At the trial before Best, C. J., London sittings in Easter term, it was objected on behalf of the defendant that, as the bill was drawn payable to the drawer's order in London, presentment in London ought to have been averred and proved. The Chief Justice overruled the objection, and a verdict was found for the plaintiff.

Bosanquet, Serjt., in Easter term, moved to arrest the judgment, upon the objection made at the trial.

He contended that the present case did not fall within the provisions of the 1 & 2 G. IV. c. 78 (which enacts that an acceptance made payable at a banker's shall be deemed a general acceptance, unless accompanied with the words "and not elsewhere"), that act, according to its title, being confined to acceptances, and applied only to cases where the bill is by the acceptance made payable at a particular place, and not to cases where the drawer makes it so payable by the language in the body of the bill. This, then, was a general acceptance of a bill drawn payable in London; and, the statute not having proposed to alter the effect of a general acceptance, the case must be considered as a case before the statute; but before the statute, on such a bill, presentment to the acceptor in London was a condition precedent to the holder having any claim against him, or at all events an averment that due diligence had been used, without success, to find his place of business. He cited Saunderson *v.* Bowes, Dickinson *v.* Bowes,[1] and Howe *v.* Bowes.[2]

Wilde, Serjt. The object of the statute 1 & 2 G. IV. c. 78, would be defeated, if an acceptance payable at a particular place by reason of the language used by the drawer were not as much within the

[1] 16 East, 110. [2] Id. 112.

operation of the act as an acceptance made payable at a particular place by reason of the language used by the acceptor.

Independently, however, of the act, enough appears on the declaration to show the defendant's liability. In an action against an acceptor, an averment of presentment is not necessary, the action is a sufficient demand; and the holder is not limited to place, in making his demand, 1 Roll. Abr. 443, Condit. (O.), Com. Dig. Condit. (G. 9); nor to time, Turner *v.* Hayden.[1] After the bill is due, the amount is payable on demand, and an averment of request is not necessary. Huffam *v.* Ellis.[2]

Bosanquet was heard in support of his rule in this term, and the court having taken time to consider,

BEST, C. J., now delivered judgment. In this case, it is unnecessary for us to consider whether, independently of Serjt. Onslow's act, the declaration ought to have contained an averment that the bill was presented for payment to the acceptor in London, or an excuse for non-presentment; because we are all of opinion that the omission is cured by that act. Perhaps the preamble of the act does not apply to such a case as the present, but it is a remedial statute; and the enacting part seems clearly to embrace every instance in which a bill is made payable at a particular place: "If any person shall accept a bill of exchange payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed and taken to be to all intents and purposes a general acceptance of such bill."

The words of the act embrace any bill payable at a banker's or other place; and no distinction is made between the case where the bill is rendered so payable by the language of the drawer, and the case where it is rendered so payable by the language of the acceptor.

If the bill be drawn payable in London, and accepted as drawn, that is a general acceptance, unless the acceptor adds the words provided by the act for limiting the acceptance, "and not elsewhere."

The acceptor has not done this; and we are therefore of opinion that judgment ought not to be arrested. *Rule discharged.*[3]

[1] 4 B. & C. 1. [2] 3 Taunt. 415.

[3] Fayle *v.* Bird, 6 B. & C. 531, *accord.*

Roach *v.* Johnston, Hayes & Jones, 246, *contra.* — ED.

POOLE v. CROMPTON.

In the Exchequer, Hilary Term, 1827

[*Reported in 5 Dowling*, 468.[1]]

Assumpsit by indorsee against acceptor of a bill of exchange for £16 0*s.* 4½*d.* Plea: That after the making of the promise in the declaration mentioned, and after the said bill of exchange became due and payable, and before the commencement of this suit, to wit, on, &c., the defendant was ready and willing, and then tendered and offered to pay to the plaintiff the sum of £16 0*s.* 6*d.*, being the amount of the said bill, together with interest for the same from the day when the said bill became due and payable to the day of the tender of the said sum; to receive which of the defendant the plaintiff then wholly refused; and the defendant further saith that he hath always, according to his said promise, from the time the said bill of exchange became due and payable, been ready and willing, and still is ready and willing, to pay to the plaintiff the amount of the said bill of exchange, with interest as aforesaid, and he now brings into court the sum of £16 0*s.* 6*d.*, ready to be paid to the plaintiff, if he will accept the same. Demurrer and joinder.

Humfrey, in support of the demurrer, referred to Hume *v.* Peploe[2] as an authority to show that a tender after the day of payment could not be pleaded to an action against the acceptor of a bill of exchange.

R. V. Richards, in support of the plea. As the law at present stands, the greatest inconvenience would arise if the acceptor of a bill were not permitted to plead this plea. The holder may proceed against the acceptor without making any application for payment; and, if he has no mode of protecting himself by making a tender, he may always be liable for costs. [Parke, B. By accepting the bill, he has bound himself to pay with or without notice, and it is his business to find out the holder and pay him.] In ancient times, no indorsement was valid without notice to the acceptor; but, since the custom of notice has been discontinued, the acceptor has no means of knowing in whose hands the bill is. The question is whether it is sufficient to plead a tender in the way it is pleaded here. Hume *v.* Peploe was decided on the authority of Giles *v.* Hartis:[3] the objection was that the plea only averred a readiness to pay from the time of making

[1] *s. c. nomine* Poole *v.* Tumbridge, 2 M. & W. 223. — Ed.
[2] 8 East, 168. [3] 1 Lord Raymond, 254.

the tender, and Lord Ellenborough asks if there was any case where an averment of *touts temps prist* was not holden to be necessary in a plea of tender. The present case is different, for here it is expressly averred that the "defendant has always, according to his said promise, from the time the said bill of exchange became due and payable, been ready and willing, and still is ready and willing, to pay the amount of the said bill." Johnson *v.* Clay,[1] which was an action of covenant for rent, governs the present case; since there is the same liberty to pay rent on the day when it becomes due as to pay a bill of exchange. In that case, the court did not entertain a doubt as to a plea of tender being good. Other authorities are collected in 1 Wms. Saund. 33 b. (n. d.).

Humfrey, in support of the demurrer, was stopped by the court.

LORD ABINGER, C. B. If it were now for the first time a question whether a good plea of tender could be made in an action against the acceptor of a bill of exchange, the case of Hume *v.* Peploe is a sufficient authority against it.[2] I am not, however, prepared to say that no case could arise in which the acceptor of a bill might successfully plead a tender. Suppose he stated that when the bill became due he went to the house of the holder of the bill for the purpose of paying it, and he was not at home, and that the acceptor afterwards found the holder, and tendered the money: would not that be a good plea? I think the technical rules of law ought not to be abused, so as to make the machinery of a court of justice the means of getting costs though I do not see how we can relieve the defendant upon that objection. But, if the acceptor of a bill goes to the holder's residence when the bill becomes due, and cannot find him, but afterwards tenders him the money, it would be unjust to say that the acceptor is to be liable to an action, and is not to be allowed to plead that tender. The present plea, however, does not go that length. It is quite consistent with this plea that the acceptor well knew where the holder lived. Supposing, therefore, that Hume *v.* Peploe does not apply, this plea does not disclose a sufficient defence.

PARKE, B. There seems to me no doubt that this plea is bad. The declaration states the contract, and that the defendant promised to pay the amount of the bill according to the tenor and effect thereof, and of his said acceptance. This promise is admitted by the plea. By law it is clear an indorser has a right of action against the acceptor without giving him any notice; and that, when a person accepts a ne-

[1] 7 Taunt. 486; s. c. 1 J. B. Moore, 200.

[2] In Hume *v.* Peploe, the bill had been presented for payment at maturity, and dishonored, and the plea alleged a subsequent tender of principal and interest. The case is therefore widely different from that of Poole *v.* Crompton. — ED.

gotiable bill, he, by law, obliges himself to pay it without notice. If the acceptor has put himself in a situation of hardship and difficulty, by not being able to find the holder, it is his own fault: he is bound to pay on the precise day. The meaning of a plea of tender is that the defendant has always been ready to perform his engagement, and does perform it by tendering the amount which he is liable to pay. It is clear, from the case of Hume v. Peploe, that this plea is bad: it does not state that the defendant was ready upon the day when the bill became due. With respect to the case of Johnson v. Clay, there must be some inaccuracy in the report, or a mistake on the part of the learned judges. It seems there to have been considered necessary, in order to defeat a tender, that the plaintiff should prove a demand subsequent to the tender. That however is not so, and upon this principle, that the party was not ready to perform his contract at the time he is stated to be ready.

BOLLAND, B., concurred. *Judgment for the plaintiff.*[1]

HANSARD v. ROBINSON.

IN THE KING'S BENCH, JULY 3, 1827.

[*Reported in 7 Barnewall & Cresswell*, 90.]

THIS was an action by the plaintiff, as indorsee, against the defendant, as acceptor of a bill of exchange for £32 1*s.* 6*d.*, dated the 10th of October, 1823, drawn by Henry Butterworth, payable forty days after date, accepted by the defendant, and indorsed by Butterworth to the plaintiff. Plea, the general issue. At the trial before Littledale, J., at the Westminster sittings after Michaelmas term, 1826, it was proved by the drawer that the defendant, being indebted to him in the sum of £32 1*s.* 6*d.* for books, he, on the 10th of October, 1823, drew a bill on him for that sum, payable at forty days after date, which the defendant accepted. The bill was drawn on a proper stamp. Butterworth indorsed the bill in blank, and delivered it so indorsed to the plaintiff. The bill became due on the 22d of November, 1823, but was not presented for payment until the 1st of May, 1824. The defendant then offered to give in payment another bill; but before that bill was given the plaintiff's clerk lost the original bill. The plaintiff informed the defendant of the loss, and offered him an indemnity; but he refused to

[1] Conf. Hume v. Peploe, 8 East, 168; Dobie v. Larkan, 10 Ex. 776. — ED.

pay the amount, unless the bill was produced and delivered up to him. Upon this evidence, it was contended that the plaintiff, the indorsee of the bill, could not recover against the acceptor, unless the bill were produced or shown to have been destroyed, because the acceptor was liable to be sued by a *bona fide* indorsee for value at any time, even although the bill might have been obtained by a prior party through fraud or felony; that there was no privity between the indorsee and the acceptor except through the bill; and that the latter by his acceptance undertook only to pay the bill upon its being produced and delivered up to him. There was no breach of his contract, unless the bill were so produced by the holder, and unless the latter offered to deliver it up on being paid the amount. As to the offer of indemnity, a court of law had no power to compel a party, who by law was entitled to have the bill delivered up to him, to take an indemnity. A court of equity is the proper tribunal to judge of the sufficiency of the indemnity. The learned judge was of opinion that the plaintiff was not entitled to recover, unless he produced the bill, and directed a nonsuit, with liberty to the plaintiff to move to enter a verdict for the amount of the bill. A rule *nisi* having been obtained for that purpose,

Campbell and *Patteson*, in Easter term, showed cause. There are certainly contradictory authorities on this point; but the *nisi prius* cases of Pierson *v.* Hutchinson, Mayor *v.* Johnson,[1] Poole *v.* Smith,[2] Dangerfield *v.* Wilby,[3] Bevan *v.* Hill,[4] and a case tried before Lord Eldon, when Chief Justice of the Court of Common Pleas, and mentioned by him in *Ex parte* Greenway,[5] and two cases *in banc*, decided by the Court of Common Pleas, Davis *v.* Dodd[6] and Champion *v.* Terry,[7] are in favor of the defendant. Williamson *v.* Clements[8] is not an authority against him, for there the action was on a special promise, and the consideration stated for that promise was that the defendant was *indebted* to the plaintiff on a bill of exchange; and that the plaintiff, having lost the bill, had, at his request, given him a bond acknowledging payment, and conditioned to indemnify him against the bill; and on motion in arrest of judgment it was held that, after verdict, it must be taken to have been proved at the trial that the defendant was so indebted, and that there was, therefore, a good consideration for the promise. In Long *v.* Baillie,[9] the bill was specially indorsed to the plaintiff, and had no indorsement from him upon it, and no other person but the plaintiff could have acquired a right to sue thereon.

[1] 3 Camp. 324.
[2] Holt N. P. 144.
[3] 4 Esp. N. P. C. 159.
[4] 2 Camp. 381.
[5] 6 Ves. Jr. 812.
[6] 4 Taunt. 602.
[7] 3 Brod. & B. 295.
[8] 1 Taunt. 523.
[9] 2 Camp. 214.

Brown *v.* Messiter[1] was a decision of a single judge, and no cause was shown against the rule for referring the bill to the Master, to compute principal and interest; and Glover *v.* Thomson[2] was an undefended cause. Hart *v.* King[3] was a *nisi prius* case before Holt, C. J., and it does not appear from the report in what character the plaintiff sued. The bill might have been either indorsed specially or not at all; it might have been proved to have been destroyed, or might have been in such a state when lost that other persons could not recover upon it.

Gurney and *Chitty*, contra, relied upon the three last-mentioned cases; and on a *nisi prius* case of Dart *v.* Hinckes, tried before Lord Tenterden, and a case of Rolfe, Assignee, *v.* Watson, before Best, C. J., at the sittings in last Easter term, where, in an action on a lost bill, the jury having found that the bill was not indorsed at the time of the loss, the plaintiff was permitted to recover. And they contended that it was material for the plaintiff in this case that the bill was not lost until after it became due, and after the defendant had made default in not paying it when presented. *Cur. adv. vult.*

Lord Tenterden, C. J., now delivered the judgment of the court. This was an action on a bill of exchange, brought by the indorsee against the acceptor. The bill was not produced at the trial, but proof was given of the signature of the parties, and other particulars of the bill, and that it was lost after it had become due, and after payment had been required of the defendant, and he had requested time and promised payment.

It is not necessary to say whether any special action could have been framed and maintained upon the particular facts and the defendant's promise, because the declaration in the present cause is not founded upon such facts, but upon the bill itself, in the usual way. We would not, however, be understood to give any encouragement to such an action; and we think the special facts cannot properly be considered as affording a satisfactory ground for decision in this case, but the case must be considered generally, as an action brought upon a lost bill, and introducing the general question whether such an action can be maintained.

Upon this question, the opinions of judges, as they are to be found in the cases quoted at the bar, have not been uniform, and cannot be reconciled to each other. It is not necessary to advert again to the cases. Amid conflicting opinions, the proper course is to revert to the principle of these actions on bills of exchange, and to pronounce such a decision as may best conform thereto. Now, the principle upon

[1] 3 M. & S. 281. [2] 1 Ryan & Moody, 403. [3] 12 Mod. 310.

which all such actions are founded is the custom of merchants. The general rule of the English law does not allow a suit by the assignee of a *chose in action*. The custom of merchants, considered as part of the law, furnishes, in this case, an exception to the general rule. What, then, is the custom in this respect? It is that the holder of the bill shall present the instrument, at its maturity, to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill. The acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer.[1] If, upon an offer of payment, the holder should refuse to deliver up the bill, can it be doubted that the acceptor might retract his offer or retain his money? And if this be the right of an acceptor, ready to pay at the maturity of the bill, must not his right remain the same if, though not ready at that time, he is ready afterwards; and can his right be varied, if the payment is to be made under a compulsory process of law? The foundation of his right, his own security, his voucher, and his discharge toward the drawer, remain unchanged. As far as regards his voucher and discharge toward the drawer, it will be the same thing whether the instrument has been destroyed or mislaid. With respect to his own security against a demand by another holder, there may be a difference. But how is he to be assured of the fact either of the loss or destruction of the bill? Is he to rely upon the assertion of the holder, or to defend an action at the peril of costs? And if the bill should afterwards appear, and a suit be brought against him by another holder, — a fact not absolutely improbable in the case of a lost bill, — is he to seek for the witnesses to prove the loss, and to prove that the new plaintiff must have obtained it after it became due? Has the holder a right, by his own negligence or misfortune, to cast this burden upon the acceptor, even as a punishment for not discharging the bill on the day it became due? We think the custom of merchants does not authorize us to say that this is the law. Is the holder, then, without remedy? Not wholly so. He may tender sufficient indemnity to the acceptor; and, if it be refused, he may enforce payment thereupon in a court of equity.[2] And this is agreeable to the mercantile

[1] And if, after payment, the holder should refuse to deliver up the bill, the acceptor may recover the money in *assumpsit* for money had and received (Alexander *v.* Strong, 9 M. & W. 733), or maintain trover for the bill. Otisfield *v.* Mayberry, 63 Me. 197; Stone *v.* Clough, 41 N. H. 290; Pierce *v.* Gilson, 9 Vt. 216; Spencer *v.* Dearth, 43 Vt. 98. See also Cornes *v.* Taylor, 10 Ex. 441. — Ed.

[2] Tercese *v.* Geray, Finch, 301; Walmesley *v.* Child, 1 Ves. Sr. 341; *Ex parte* Greenway, 6 Ves. 812; Davies *v.* Dodd, 4 Price, 176; Macartney *v.* Graham, 2 Sim. 285; Crawford *v.* Summers, 3 J. J. Marsh. 300; Savannah Bank *v.* Haskins, 101 Mass. 370; Green *v.* Stone, Walker, Ch. 109; Allen *v.* State Bank, 1 Dev. & B. Eq. 3 Fisher *v.* Carroll, 6 Ired. Eq. 485; Chewning *v.* Singleton, 2 Hill, Ch. 371, *accord*.

law of other countries. In the modern Code de Commerce of France, Liv. 1, Tit. 9, Art. 151, 152, this is distinctly provided. And this provision is not new in the law of that country, but is found also in the Ordonnance de Commerce of Louis the Fourteenth, Tit. 5, Art. 19. The rule for entering a verdict for the plaintiff must therefore be discharged. *Rule discharged.*[1]

ANN WILLIAMS *v.* GERMAINE THE ELDER.
SAME *v.* GERMAINE THE YOUNGER.

IN THE KING'S BENCH, NOVEMBER 21, 1827.

[*Reported in 7 Barnewall & Cresswell*, 468.]

THE former of these cases was an action by the indorsee against the acceptor of a bill of exchange for the honor of the drawer. In the first count of the declaration, it was stated that Germaine the Younger, on the 29th of April, 1826, in parts beyond the seas, at, &c., drew a bill of exchange for £71 11*s.* 9*d.* upon Messrs. Pugh & Redman, London, payable, thirty days after sight, to the order of one Henry Williams, who indorsed it to the plaintiff; that on the 20th of July, in the same year, at, &c., the bill was presented to Pugh & Redman for acceptance, who then and there had sight of it, but did not, nor would then, or at any time before or afterwards, accept the same, or pay the sum of money therein mentioned, but wholly refused so to do; that the bill was duly protested for non-acceptance, whereof the

But, when the bill or note is in the possession of an adverse claimant, the plaintiff cannot recover on the instrument, either at law or in equity, even though the adverse claimant be in a foreign country. Van Alstyne *v.* Nat. Bank, 4 Abb. App. 449; Crandall *v.* Schroeppel, 1 Hun, 557; Burns *v.* Tallon, A. M. & O. 299. Conf. Union Bank *v.* New Orleans, 5 Am. L. Reg. N. S. 555.

If the plaintiff's bill is in the possession of the defendant, its production by the plaintiff is of course excused. Smith *v.* McClure, 5 East, 477; Cook *v.* Darwin, 18 Beav. 60; Robinson *v.* Curry, 6 Ala. 842; Garlock *v.* Geortner, 7 Wend. 198. — ED.

[1] Poole *v.* Smith, Holt, N. P. 144; Pooley *v.* Millard, 1 C. & J. 411 (*semble*); Powell *v.* Roach, 6 Esp. 76; Green *v.* Stone, Walker, Ch. 109 (*semble*); Kirby *v.* Sisson, 2 Wend. 550; Rowley *v.* Ball, 3 Cow. 303; Van Alstyne *v.* Nat. Bank, 4 Abb. App. 449; Davis *v.* Miller, 14 Grat. 1, 14 (*semble*); Moses *v.* Trice, 21 Grat. 556, *accord.*

Hart *v.* King, 12 Mod. 310; Glover *v.* Thompson, Ry. & M. 408 (*overruled*); Peabody *v.* Denton, 2 Gall. 351; Wade *v.* Wade, 12 Ill. 89; Abbot *v.* Striblen, 6 Iowa, 191; Brent *v.* Ervin, 3 Mart. N. S. 303; Torrey *v.* Foss, 40 Me. 74; Moore *v.* Fall, 42 Me. 450; Smith *v.* Walker, Sm. & M. Ch. 432 (*semble*); Thayer *v.* King, 15 Oh. 242; Meeker *v.* Jackson, 3 Yeates, 442; Bisbing *v.* Graham, 14 Pa. 14, *contra.*

See Morgan *v.* Reintzel, 7 Cranch, 273; Posey *v.* Decatur Bank, 12 Ala. 802; Jacks *v.* Darrin, 3 E. D. Sm. 548. — ED.

defendant, on, &c., had notice, and thereupon the defendant, on, &c., at, &c., in order to prevent the said bill from being sent back and returned to the drawer, did, under the said protest, accept the said bill, and make it payable at No. 6 Union Court, Old Broad Street, and delivered the bill so accepted and indorsed to the plaintiff; that the bill when it became due — to wit, on the 22d of August — was duly shown and presented at the place where it was made payable by the said acceptance, and payment of the sum of money therein mentioned was duly demanded, according to the tenor and effect of the bill, and of the acceptance and indorsement; but that neither the defendant, nor any person on account of the defendant, or the drawer, did, or would, pay the bill, &c. The second count was similar, with the exception that defendant's acceptance was stated as a general acceptance under protest, and not making the bill payable at a particular place. The third count stated an acceptance by defendant, payable at 6 Union Court, for the honor of the drawer, without averring a previous presentment to the drawees. The fourth count varied from the third, as the second from the first. Plea, the general issue. At the trial before Lord Tenterden, C. J., at the Guildhall sittings after Michaelmas term, 1826, it appeared that the bill was drawn abroad by Germaine the Younger, and indorsed by the payee to the plaintiff. On the 12th of July, it was presented to the drawees for acceptance, and protested for non-acceptance. On the 20th of the same month, Germaine the Elder accepted the bill for the honor of the drawer, and this appeared on the face of the bill. On the 22d of August, when, according to the acceptance, the bill became due, it was presented for payment to the drawees, and to the acceptor for honor, and dishonored and protested for non-payment. Notice of the non-acceptance and subsequent dishonor of the bill when presented for payment was not given to the drawer; but, his residence being unknown, it was conceded that the holder was not bound to give it. *Parke*, for the defendant, objected that it was incumbent on the plaintiff to prove a due presentment for payment to the drawees, and protest for non-payment before the acceptor for honor could be called upon to pay (Hoare v. Cazenove [1]), and that the presentment to the drawees was not at the right time; for that the bill being made payable at a certain time after sight, was at maturity as against the drawees on the 14th of August, but it was not presented to them for payment until the 22d.

The second action was against the drawer. In this case, the evidence was the same, and the same objection was taken to the plaintiff's right to recover. The Lord Chief Justice overruled the objection, and the plaintiff had a verdict in each case, the defendant having leave to

[1] 16 East, 391.

move to enter a nonsuit. *Parke*, in Hilary term, 1827, renewed his objection to the plaintiff's right to recover, and contended that the case of Hoare *v.* Cazenove was a direct authority in his favor, unless it should be held that there was some sound distinction between a bill payable after sight and one payable after date, or between actions against a drawer and indorser. The holder, by neglecting to present the bill to the drawees for payment at the time when it was due, according to the time when they had sight of it, gave time to them without the assent of the acceptor for honor, or of the drawer, who were thereby discharged.

Lord Tenterden, C. J. I am of opinion that there is not any sufficient ground for the motion, either on behalf of the drawer or the acceptor. This was a bill payable thirty days after sight. On the 12th of July, it was presented for acceptance, and that having been refused, it was duly protested; but, the drawer's address not being known, notice could not be given. The bill was then taken to Germaine the Elder, and on the 20th of July he accepted it for the honor of the drawer. Thirty days elapsed; and then, the usual days of grace having been allowed, it was presented to the original drawees, and to the acceptor for honor, but both refused payment. The first question is, whether the drawer is liable under these circumstances. It is not necessary to decide on the effect of an acceptance for honor where no presentment for payment is made to the drawees. Here presentment was made to them at the time when the bill became due, according to the acceptance for honor, and I think that sufficed. This circumstance distinguishes the present case from Hoare *v.* Cazenove. The bill in that case was payable at a certain period after date, and no presentment for payment was ever made to the drawee: the decision, therefore, cannot be cited as an authority for saying that a bill should, under the circumstances proved in this case, be presented for payment to the drawees, and to the acceptor for honor, at two different times. Such a rule might be prejudicial to the acceptor for honor, and in the present case it would have compelled the holder to present the bill to the drawee eight days before the expiration of the time allowed to the actual acceptor for payment.

Parke then moved in arrest of judgment in each case, on the ground that the declaration did not aver a presentment for payment to the drawee and protest for non-payment, but only to the acceptor for honor; and upon this point a rule *nisi* was granted, against which, on a former day in this term,

Campbell showed cause, first, in the action against Germaine the Elder. The engagement of an acceptor for honor is absolute, not conditional: it was, therefore, unnecessary to present the bill for payment

to the drawee. Secondly, supposing that to be necessary, still the declaration is sufficient after verdict. This case is distinguishable from that of Hoare v. Cazenove, the bill being made payable after sight, whereas in that case it was payable after date. If the two cases had been precisely similar, it would have been difficult to get over that authority, although the reasons given in support of the decision are not satisfactory. *Ex vi termini*, an acceptor is in a different situation from a drawer or indorser; but the acceptor for honor is placed in the same situation as those parties, according to the decision referred to, which, indeed, professes to proceed on authority, and not on the convenience of the thing; and, looking at the authorities cited, they do not appear to warrant the judgment there given. Beawes, Lex Merc., tit. Bills of Exchange, § 43, is cited, which is an express authority for saying that the obligation of the acceptor for honor is absolute, not conditional. Then Lewin v. Brunetti,[1] Malyne, p. 273, and Pothier, Contrat de Change, part 1, c. 5, § 137, are referred to, as proving the reverse. The first of these was an action by the first indorser, for whose honor the bill had been paid, against the acceptor for honor. The custom was set out on the record. [BAYLEY, J. LORD ELLENBOROUGH, commenting on the custom set out, says: "Thus two protests, *i. e.* for non-payment as well as non-acceptance, were in this case held necessary by the custom of merchants."] No point was made about the second presentment or protest. It is true, his lordship observes, that no objection was made to the custom as stated; but no objection could be made to it on a writ of error. Then, as to the passages quoted from Malyne,[2] it is plain, taking the whole together, that he is speaking of that which is necessary in order to give the payer for honor a remedy over, and not of that which is necessary to make the acceptor for honor liable to the indorsee of the bill.[3] Nor is it by any means clear that Pothier, in the passage referred to (Contrat de Change, part 1, c. 5, art. 2), is discussing the exact point now before the court:[4] it would rather seem that he is pointing out the steps necessary to make third persons liable, after non-payment by an acceptor for honor. The reason of the thing certainly is not in favor of the objection. The holder of the bill, out of indulgence to the drawer, allows a third person to accept for his honor: it would be hard if, on that account, he were bound to take the extra trouble of presenting it a second time to the drawee. Besides, if that were so, presentment must be made, both to the drawee and the acceptor for honor, on the day when the bill becomes due; but this would be im-

[1] Lutw. 896.
[2] Page 275.
[3] See Vandewall v. Tyrrell, 1 M. & M. 87.
[4] See part 1, c. 4, art. 5.

possible if the parties lived at any considerable distance from each other. Secondly, if a second presentment to the drawee were necessary, still the declaration is sufficient after verdict. It states that the bill was duly presented, and payment duly demanded; but that could not be true, unless it were presented both to the drawee and the acceptor for honor, if such presentment be necessary. In Solomons v. Stavely,[1] it was held that the omission of an allegation of protest was only matter of form, and could not be taken advantage of on general demurrer. If, without proof of such presentment at the trial, the plaintiff was not entitled to recover, then, after verdict in his favor, it must be presumed (as was the fact) that such proof was given; and then the omission in the declaration is aided, according to the cases cited in 1 Wm. Saund. 228, n. (1). As to the other case, there is no real difference between the action against the drawer and against the acceptor for his honor.

Parke, contra. The only question for the court is whether Hoare v. Cazenove were rightly decided or not; and it is very important to adhere to decided cases on questions of commercial law, for subsequent contracts are made on the faith of them. The only authority cited on the other side, as at variance with that decision, is Beawes, Lex Merc.; but that was noticed by Lord Ellenborough, and fully answered, and he assigns very sufficient reasons for the judgment then pronounced by the court. Then it was said that Hoare v. Cazenove is not supported by the case of Brunetti v. Lewin; but the custom there set out on the record agrees with that which is now contended for, and it must be taken to have been proved as laid. A difficulty was also suggested, arising out of the supposed necessity of presenting to the drawee and acceptor for honor on the same day; but there is no authority for saying that the presentment to both must be on the same day, and the law always allows a reasonable time for the performance of that which it requires to be done. [BAYLEY, J. In Hoare v. Cazenove, the acceptance was for the honor of the indorser.] Every indorser is in effect a new drawer; and although that was a bill payable after date, and this is payable after sight, the principle of the former decision, viz., that the undertaking of the acceptor for honor is conditional only, is equally applicable to both, and cannot be affected by the mode of ascertaining the time of payment. The case Rushton v. Aspinall[2] disposes of the next point that was made; and the argument as to the effect of the averment, that the bill was duly presented to the defendant, is answered by Everard v. Paterson,[3] where, in an action on a bond, conditioned for the performance of an award, so as it was made

[1] Doug. 684, n. 144. [2] Doug. 680. [3] 2 Marsh. 304.

under the hands of the arbitrators, it was averred that the arbitrators did in due manner duly make their award in writing; and on error this was held insufficient. In the other action against the drawer, Pothier, part 1, c. 5, § 137, is a clear authority for the defendant, even supposing him to be treating of that which is necessary to charge third persons, as has been suggested. *Cur. adv. vult.*

The judgment of the court was now delivered by

Lord Tenterden, C. J. There were two cases argued yesterday, of Williams and Germaine the Elder, and Williams and Germaine the Younger, — Germaine the Elder being the acceptor of a bill of exchange for the honor of the drawer, and Germaine the Younger being the drawer of the bill. The objection taken in arrest of judgment was that the declaration did not allege that when the bill arrived at maturity — that is, at the expiration of the time after it was exhibited to the drawee — it was ever presented to that drawee for payment, or protested for non-payment. In support of the objection, counsel relied on a case in 16 East, Hoare v. Cazenove. That case underwent grave consideration by this court, which at that time was filled by very learned judges, the assistance of one of whom we have the satisfaction of having at the present moment. In the course of the argument, much was addressed to us to show that that judgment ought not to have been given. If we could have been convinced that a judgment given even by persons of the description to which I have alluded was founded on a mistake of the law, it would have been our duty to have decided contrary to it; but we ought not to overrule a solemn decision of the court, unless we perfectly concur in saying that such judgment was founded on a mistake. It is of great importance in almost every case, but particularly in mercantile law, that a rule once laid down and firmly established, and continued to be acted upon for many years, should not be changed, unless it appears clearly to have been founded upon wrong principles. If, however, the matter were new, I am by no means prepared in my own mind to say I should not have come to the same decision, although I should have paused, before I pronounced a judicial opinion on the subject, longer than, having that authority before me, I think it necessary to do. Whatever is requisite to enable a person who has accepted a bill for the honor of another to call upon that person to repay him, and to enable him to recover over against such person, may also be reasonably held necessary to enable another party to recover against such an acceptor for honor. For, if you could recover against an acceptor for honor by proof of less than will enable him to recover against the party for whom he accepts, there would be an inconsistency; for it might be said with some reason that,

if the acceptor for honor chose to pay without requiring all the proof from the holder which would be necessary for him to recover against the drawer, the payment would be made in his own wrong, and he would not be entitled to recover over. It seems to me, therefore, that the same rule as to proof which prevails in the case of an acceptor for honor, in suing a party for whose honor he accepts, must also be observed when the holder of a bill sues the person so accepting. The result, as it seems to me, of the decision to which I have alluded, is that an acceptance for honor is to be considered not as absolutely such, but in the nature of a conditional acceptance. It is equivalent to saying to the holder of the bill: Keep this bill; don't return it; and when the time arrives at which it ought to be paid, if it be not paid by the party on whom it was originally drawn, come to me, and you shall have the money. This appears to me to be a very sensible interpretation of the nature of acceptances for honor, where the parties say nothing upon the subject. In an action by the holder against the drawer of the bill, to be sure he has a right to say: If you keep it till its time has run out, you ought to have presented it to the person on whom I drew it, and have seen whether on the presentment he would pay; whereas, you forbore to do so, and have relied on an acceptance by some person for my honor made without my authority. We think that we are bound by authority, and I am inclined to say by reason, to confirm the decision in Hoare *v.* Cazenove; consequently, the rule for arresting the judgment in this case must be made absolute. *Rule for arresting judgment made absolute.*[1]

WILLIAMS *v.* WARING.

IN THE KING'S BENCH, NOVEMBER 7, 1829.

[*Reported in* 10 *Barnewall & Cresswell*, 2.]

ASSUMPSIT on a promissory note, by the indorsee against the maker. Plea, *non assumpsit*. At the trial before Jervis, J., at the last summer assizes for Denbighshire, the note, when produced in evidence, appeared to be in the following form: —

[1] Hoare *v.* Cazenove, 16 East, 391; Walton *v.* Williams, 44 Ala. 347; Schofield *v.* Bayard, 3 Wend. 488 (Holder *v.* Drawer); *accord*.
Conf. Mitchell *v.* Baring, 10 B. & C. 4. — ED.

"31st January, 1827.

"Two months after date, I promise to pay to A. B. £25, value received. J. WARING.

"At Messrs. B. and Co.'s, bankers, London."

The whole of the note, including the memorandum in the corner, was in the handwriting of the defendant, the maker of the note, and the memorandum was proved to have been written at the time when the note was made. For the defendant, it was contended that the note should have been described in the declaration as payable at Messrs. B. & Co.'s; and that evidence of presentment there should have been given. The learned judge overruled the objection, but gave the defendant leave to move to enter a nonsuit.

Campbell now moved accordingly, and contended that, as the memorandum at the foot of the note was written by the maker at the time of making the note, it was as much parcel of the contract as if it had been in the body of the instrument; and that consequently presentment at the house where the note was made payable should have been averred and proved. Trecothick v. Edwin.[1]

LORD TENTERDEN, C. J. In point of practice, the distinction between mentioning a particular place for payment of a note, in the body and in the margin of the instrument, has been frequently acted on. In the latter case, it has been treated as a memorandum only, and not as part of the contract; and I do not see any sufficient reason for departing from that course.

BAYLEY, J. The case of Exon v. Russell[2] is expressly in point, for the present plaintiff, with this single exception, that the memorandum in that case was not proved to have been written by the defendant. But it was there at the time when the note was made, and therefore the effect of it was the same; and the plaintiff having averred that the note was payable at the particular house, the court held that it was misdescribed. That is a sufficient authority for a decision in this case in favor of the plaintiff. *Rule refused.*[3]

[1] 1 Stark. N. P. C. 468.

[2] 4 M. & S. 505.

[3] Head v. Sewell, Holt, N. P. 363; Richards v. Milsington, Holt, N. P. 364, n.; Price v. Mitchell, 4 Camp. 200; Saunderson v. Judge, 2 H. Bl. 509; Wild v. Rennards, 1 Camp. 425 n.; Exon v. Russell, 4 M. & S. 505; Masters v. Baretto, 8 C. B. 433, *accord.*

See Warrington v. Early, 2 E. & B. 765; Hardy v. Woodroffe, 2 Stark. 319; Sproule v. Legg, 3 Stark. 156. — ED.

HOLDSWORTH v. JAMES HUNTER THE YOUNGER.

IN THE KING'S BENCH, JANUARY 28, 1830.

[*Reported in* 10 *Barnewall & Cresswell*, 449.]

ASSUMPSIT by the plaintiff as indorsee against the defendant as acceptor of two bills of exchange, one for £5000, the other for £4399 19*s.* 7*d.*, drawn by M'Kenzie & Co. in the following form: —

"£5000. CALCUTTA, 12th July, 1825.

"At six months after sight, pay this, our first of exchange (second and third not paid), to the order of Messrs. W. Hunter & Co., the sum of £5000 sterling. Value in amount.

"T. M'KENZIE & Co.

"To Messrs. James Hunter, Jr., & Co., London."

Plea, the general issue. At the trial before Lord Tenterden, C. J., at the London sittings after Michaelmas term, 1828, the following facts appeared in evidence: The bills of exchange in the declaration mentioned were drawn in Calcutta by M'Kenzie & Co.; and in the month of December, 1825, the defendant, J. Hunter, who was also a partner in the firm of W. Hunter & Co. (the payees), received the second part of each of these two bills, which he accepted, and indorsed to his father, to whom the firm of W. Hunter & Co. were largely indebted. The defendant afterwards, in January, 1826, received from M'Kenzie & Co., by a different ship, the other parts of the bills, and accepted and indorsed the first part of each to one Fennell, who indorsed them for value to the plaintiff. The acceptance of these latter parts was ante-dated 14th November, 1825. At the time when they were actually accepted and indorsed, the parts previously accepted were in the hands of the defendant's father; but other bills were afterwards substituted for them, and they were given up to the defendant. Upon these facts, the attorney-general contended that the plaintiff could not recover for two reasons: first, that the party who first obtained the acceptance of any one part of a set of bills was entitled to the whole of them,[1] and, therefore, the plaintiff could have no right to those

[1] In Pinard *v.* Klockmann, 3 B. & S. 388, a foreign bill was drawn in four parts, of which the first part came by indorsement to the plaintiff, the fourth indorsee. This part was afterwards lost, and the plaintiff having brought an action against the second indorsee for the remaining parts, the defendant pleaded that he had never had possession of those parts. The court waiving the question of liability on the part of the drawer or immediate indorser of the plaintiff decided that no intermediate indorser was under any obligation to provide the plaintiff with the remaining parts. Conf. Kearney *v.* West Granada Co., 1 H. & N. 412. — Ed.

parts upon which the action was brought, and for this he cited Perreira v. Jopp and Another;[1] secondly, that, if the defendant was to be held bound by his acceptance of a second part, it must be treated as altogether a separate bill drawn, as well as accepted, in England, and therefore liable to the stamp duty; and that as the bills in question

[1] We have been favored by the attorney-general with the following note of this case, taken by himself at the trial before Lord Kenyon at Guildhall in 1798:—

"Trover for a bill of exchange for £1000, drawn by persons in Jamaica upon the defendants, in favor of one Jeremiah Mais, and by him indorsed to the plaintiff. The plaintiff gave notice to the defendant to produce the bill, which appeared to be the second of a set of bills drawn in favor of Mais, and dated 5th of December, 1792. The bill was indorsed to the plaintiff as stated in the declaration. The plaintiff then proved that on the 31st of October, 1793, being nearly eleven months after the date of the bill, he presented it to the defendants for acceptance, and upon a subsequent demand they refused to return it. The defendants proved that one Abraham Levien had absconded in September, 1792; that after he had absconded the plaintiff purchased a debt due from Levien to Hunter & Co., for 10s. in the pound, and obtained the necessary power to attach certain property of Levien's, then in Jamaica, in the hands of the same Jeremiah Mais; that before these attachments were laid against Mais in Jamaica, viz., on the 5th of December aforesaid, Mais had transmitted the first of the same set of bills of which the second was now in question, indorsed to A. Levien; that, in consequence of Levien's absconding, the letter enclosing the said first bill to him did not come either to his hands or to those of his assignees, he being a bankrupt, until the 8th of November, 1793; that, in the mean time, the plaintiff having heard of the transmission of the first bill of the set, and that it had not made its appearance, wrote out to Jamaica, and by means of an indemnity prevailed upon Mais to indorse and transmit the second of the bills to him, which arrived on the 31st of October, 1795, and was retained by the defendants upon presentation, in consequence of a notice given to them by the assignees of Levien of the circumstances; that a few days afterwards the letter containing the first bill indorsed to Levien was discovered. This bill was produced in court, and it appeared to be the first bill of the same set of which the second was claimed by the plaintiff. Upon this evidence, Lord Kenyon, C. J., thought the defendants clearly entitled to a verdict, because the sum which that bill represented had never been attached in the hands of Mais, he having indorsed and transmitted the first bill to Levien before the attachment could operate; consequently, the property represented by that bill, and in the hands of defendants the drawees was vested in Levien or his assignees, and the indorser Mais could not divest that property by indorsing the second bill to the plaintiff: the plaintiff had, therefore, no title to the money which these bills represented.

"Mingay, for the plaintiff, then observed that, if the plaintiff was not entitled to the £1000, he had at least a right to the piece of paper which he had left at the defendants', and which they refused to return. But Lord Kenyon denied this, and mentioned a case of Miller and Race, tried by Lord Mansfield, in which this very point was contested in an action of trover for a promissory note; in which Lord Mansfield said he could never bring himself to think for a moment that a man who had no title to the value of a bill or note could recover in an action of trover for the paper merely, which was of no value whatever. Upon this, Lord Kenyon continued that Sir Richard Lloyd put this case to Lord Mansfield, whether, if instead of a piece of paper a diamond ring had been given for a promissory note, the person who

were not stamped they were invalid. *Pollock*, contra, contended that it was a question for the jury, whether there ever had been a perfect unconditional transfer of the parts first accepted to the father, or whether they were only deposited with him until other securities were provided. If the latter were the case, then, as soon as these parts were restored to the acceptor, the *jus tertii* ceased, and could not be set up as an answer to the action. Lord Tenterden was of that opinion, and left the question to the jury, directing them to find for the plaintiff, if they thought that the parts of the bills first accepted were delivered to the defendant's father to be kept only until other securities were given. The jury found that they were so given, and returned a verdict for the plaintiff. In Hilary term, 1829, a rule *nisi* for a new trial was obtained on the objections made at the trial, and also that the question of fact ought not to have been left to the jury.

F. Pollock and *Patteson* now showed cause. The bills in this case having been drawn on the defendant, and in effect payable to his own order, all the parts were transmitted to him, and he was thereby enabled to accept and put forth more than one of them. Now, although it may be true that, as far as the drawer is concerned, the part first accepted is alone available, so that he cannot be charged more than once upon the same set of bills, yet there is no case or principle of law to prevent the drawee from accepting all the parts, and making himself liable three times over. In the case of Perreira *v.* Jopp, there never was any intention, in any of the parties, to be liable more than once. Besides, in fact, this defendant has not been charged more than once: the parts delivered to his father were deposited as a security for a debt, and afterwards delivered up upon the substitution of other securities; they have never been paid. Then as to the second point, no stamp is necessary on a bill drawn in Calcutta to be accepted in England. Unless, therefore, the bill is to be considered as altogether concocted in England, the objection fails; but it cannot be so considered without making the defendant guilty of a forgery, and the court will not allow him to set up his guilt as an answer to the action.

The *Attorney-General* and *Campbell*, contra. The case of Perreira *v.* Jopp established that, when there are several parts of a foreign bill, they form together but one bill, and he who has the first title to any one part has a right to the others also. Here one part of

possessed the ring, though without title to the value it represented, might not bring trover for it. To this Lord Mansfield replied, "that the case was very ingenious, and that he might not, perhaps, without some consideration, be able to answer it satisfactorily; but yet it did not shake his opinion that the plaintiff ought not to recover for the piece of paper under the circumstances of the case before him. Mingay then chose to be nonsuited."

each bill was first indorsed to the defendant's father, for a valuable consideration. It was left as a question to the jury whether they were so indorsed in order that he might sue upon them, or only keep them until others were substituted; but there was no evidence for the jury of such an agreement having been made, and, in fact, the bills were in the father's hands, and he had a legal right to them at the time when the other parts were indorsed to the plaintiff. The property in those parts was, therefore, in the father. In order to obviate this difficulty, the plaintiff must treat them as separate bills; but then they must be considered as emanating entirely from the defendant, not as forgeries on M'Kenzie & Co. at Calcutta, but as drawn in England in the name of a fictitious person, and consequently liable to stamp duty.

Lord Tenterden, C. J. According to the verdict of the jury, the delivery of the bills to the defendant's father was not absolute, but conditional; and I think that the facts of the case justified that finding. The parts first accepted cannot therefore be said to have been paid, for they were redeemed by the substitution of other securities. That being so, what was there to prevent the defendant from putting in circulation another part of the bills? But I am inclined to go further, and to say that the plaintiff would have been entitled to recover, even if the transfer to the father had been absolute and unconditional. For suppose two parts of a foreign bill come to the hands of the drawee, he accepts both, and indorses first one part to A., and afterwards the other part to B. In any question as to property between them, A. might be entitled to both. But the question here is whether the acceptor and indorser shall be allowed to defend himself against the holder of the one part, on account of the previous circulation of the other part? I am not aware of any principle of law upon which such a defence can be supported. But it has been further contended that this bill must be considered as drawn in England, and therefore liable to the stamp duty. That would be to put the law in opposition to the fact, for we know that the bill was actually drawn in Calcutta; and I think we ought not to strain the stamp act to meet such a case as this. If the bill had, in fact, been drawn in England, though purporting to be drawn in Calcutta, the case would have been different. For these reasons, the rule must be discharged.

Bayley, J. Where a bill is drawn in sets, the party claiming as holder ought to have all the parts, for the payment of any one part to another person may defeat him. Here there were three parts; and it so happens that all of them were sent to the drawee, who was also payee, and he had power to deal with them in those two characters. He accepted two parts, and the plaintiff claims on one of those as

indorsee. The other was indorsed by the defendant to his father, and that indorsement was prior in order of time; and if it had been unconditional, and payment had, in fact, been made to the father, there might have been a difficulty in the case which does not now exist. The indorsement to the defendant's father was conditional only, and the other indorsement to the plaintiff is clearly available, the father not having insisted on payment to himself. By the acceptance, the defendant undertook to pay that first of exchange, the second and third not being paid. They have not been paid, and no one has a valid claim on them: the plaintiff is therefore clearly entitled to recover on the first part.

LITTLEDALE, J. I agree in thinking that the plaintiff was entitled to recover. First, it seems to me that a stamp was not necessary to these bills. They were *bona fide* drawn in Calcutta as foreign bills; and even if they be considered binding on the defendant by estoppel, as separate bills, they cannot be treated as drawn in London. I feel some difficulty, however, in putting the case on this ground; for I think that the doctrine of estoppel is not to be imported into a transaction taking effect by the usage and custom of merchants. The three parts of each set originally formed but one bill, and the defendant could not divide it into two or three. But upon the other ground, I am of opinion that the plaintiff is entitled to retain the verdict. The defendant can only be liable on one part; and if one part had, in the first instance, been indorsed unconditionally to his father, he would not have been liable to the plaintiff; but as it was conditional, and the father afterwards waived that indorsement and gave up the bills, the indorsement of the other part to the plaintiff is binding.

PARKE, J. I concur in thinking that the verdict for the plaintiff was right. The action was on two foreign bills accepted by the defendant. But it was said in defence that he had before accepted another part of each bill, and indorsed it away for value. Assuming that to be so, still I think that, although the defendant had not, after so doing, power to bind the drawer, he is estopped from disputing the regularity of his own acceptance. I cannot agree that the doctrine of estoppel is inapplicable to bills; for an acceptor is always estopped from disputing that the bill was regularly drawn. Then, as to the question on the stamp act, it clearly is not a foreign bill within the schedule of the 55 Geo. III. c. 104; nor is it an inland bill, for it was not drawn in England. Snaith *v.* Mingay [1] appears to be exactly in point, where Le Blanc, J., observes, "Whether this was a perfect bill in Ireland is not so much the question as whether it was a bill drawn in

[1] 1 M. & S. 87.

England." So here the question as to the stamp is, Was this bill drawn in England? Certainly it was not; and we ought not by construction to extend the provisions of the stamp act to meet such a case as this. The rule for a new trial must therefore be discharged.

Rule discharged.[1]

DIXON v. NUTTALL.

In the Exchequer, Trinity Term, 1834.

[*Reported in* 1 *Crompton, Meeson, & Roscoe*, 307.]

Assumpsit on the following promissory note: —

"I promise to pay to M. A. D. or bearer, on demand, the sum of £16 at sight, by given up clothes and papers, &c.

"N. Nuttall."[2]

The declaration averred that the defendant had sight.

At the trial at the sittings in Hilary term before Bolland, B., it did not appear that the note had ever been presented, or that the defendant ever saw it after the making of it. A verdict having passed for the plaintiff, with leave to the defendant to move to enter a nonsuit, —

Bompas, Serjt., obtained a rule for that purpose, against which cause was now shown by —

Milner. Taking this instrument altogether, it is not a note payable at sight, but a mere promissory note payable on demand: the words "at sight" are inconsistent with the rest of the note, and may be rejected. The only question on such a note is, whether the three days grace are allowable on such an instrument; but that question does not arise in this case, as more than three days elapsed after the making. If sight was necessary, the sight was had at the time of the making. The making of a note is the same as the acceptance of a bill of exchange, and the maker of the one is exactly in the same situation as the acceptor of the other. Now, if a bill be drawn at or after sight, it is not necessary, where it has been accepted, to present it afterwards for sight: the acceptance is sufficient. So, in this case, the maker being the same as the acceptor, the making the note was sight sufficient, and no further presentment for sight was necessary. More than

[1] Davison v. Robertson, 3 Dow, 218, 228 (*semble*), *accord*. — Ed.

[2] It was contended at the trial that the instrument did not amount to a promissory note, on account of the expression "by given up clothes and papers;" but the learned judge was of opinion that the words in question only meant for value received, and the court afterwards refused to grant the rule *nisi* on this point.

three days elapsed after the making of the note before the bringing the action; and therefore, even if the three days of grace were allowable, the action was not brought until after they had elapsed. But on bills payable at sight these days are not allowed; so, in the case of bank post bills, the bank pays at the day. [PARKE, B. If that were so, it would be of no assistance to you. You do not show that there was any presentment or sight.] The sight was had when the note was made. No acceptance of a note is ever necessary. So here, if the note is a note at sight, and the three days were allowable, the moment the defendant signed he had had sight, and was in effect the acceptor; and, even if the three days of grace are allowable, they ran from that time. Nothing remained to be done for which it was necessary that the defendant should have the note again presented to him.

Bompas, Serjt. It was averred in the declaration that the defendant had sight, but that averment was not proved. In Holmes *v.* Kerrison,[1] it was held that no debt accrues on a note payable after sight, until it be presented for payment. That case shows there is a distinction between the acceptor of a bill and the maker of a note payable at or after sight. If the signature of a note was sight, it would be immaterial whether it was due after sight or after date. Whether the three days are to be allowed or not, at all events the words "at sight" must be construed to mean that the defendant shall see it before he can be compelled to pay it.

It is said on the other side that the words "at sight" may be rejected, and then it would be a note payable on demand; but it is just as reasonable to reject the words "on demand," and then it would be a note payable at sight. He was then stopped by the court.

PARKE, B. We are all agreed. I take it to be a rule that we are not to reject any words to which we can give a meaning. I can give a meaning to those words. The meaning is clear to this extent, that, before the defendant is to be called upon to pay this note, he is to see it. There is nothing in this which is inconsistent with the other part of the note. It is not necessary for us to say whether the three days' grace was to be allowed or not. It was argued by Mr. Milner that the making was sufficient sight; but Holmes *v.* Kerrison is an answer to that, and was a decision that such a note is not to be paid until it is presented. The meaning of this note clearly is that it is not to be paid until it has been presented to the defendant. If so, as there is no proof of a presentment, it is clear that the plaintiff is not entitled to recover.

BOLLAND, B. Holmes *v.* Kerrison is decisive on this question.

ALDERSON, B. The only difficulty I have felt is removed by

[1] 2 Taunt. 323.

Holmes v. Kerrison. It was put by Mr. Milner that a maker of a note is in the same situation as the acceptor of a bill; but that is fallacious as applied to the present question.

GURNEY, B., concurred. *Rule absolute.*[1]

PIERCE v. FOTHERGILL.

IN THE COMMON PLEAS, JUNE 16, 1835.

[*Reported in* 2 *Bingham's New Cases*, 167.]

THIS was an action on a promissory note for £391 10*s.*, bearing date Aug. 1, 1833, made by the defendant, and payable to the plaintiff, on demand, for value received.

The declaration contained no count for interest.

The witness, who proved the defendant's signature, said the note was given for money advanced by the plaintiff.

The writ was served March 22, 1834; the cause tried May 20, 1835.

The jury having found a verdict for £425 13*s.* 6*d.*, being the amount of interest from the date of the note, added to the principal sum,

Heaton obtained a rule *nisi* to reduce the damages to £391 10*s.*, on the ground that there had been no allegation or proof of any agreement for interest.

Talfourd, Serjt., and *Steer*, who showed cause, contended that when it appeared to be the intention of the parties to pay interest, the jury might allow it in the shape of damages. Nichol *v.* Thompson,[2] Calton *v.* Bragg,[3] Bruce *v.* Hunter,[4] Slack *v.* Lowell,[5] Harrison *v.* Allen.[6] At all events, as the note was payable on demand, the plaintiff was entitled to interest from the time of the commencement of the action.

Heaton. That might have been so when actions were commenced by *latitat*, which was held equivalent to demand. But the writ of summons at present in use has no such effect. And here there is no count for interest.

[1] Holmes *v.* Kerrison, 2 Taunt. 323: Sturdy *v.* Henderson, 4 B. & Al. 592; Way *v.* Bassett, 5 Hare, 55; Wolfe *v.* Whiteman, 4 Harrington, 246; Cribbs *v.* Adams, 13 Gray, 597 (*semble*), *accord*.

By stat. 34 & 35 Vict., c. 74, § 2, it is provided that "every bill of exchange or promissory note, drawn after this act comes into operation and purporting to be payable at sight or on presentation, shall have the same stamp, and shall, for all purposes whatsoever, be deemed to be a bill of exchange or promissory note payable on demand, any law or custom to the contrary notwithstanding." — ED.

[2] 1 Campb. 52, n. [3] 15 East, 223. [4] 3 Campb. 467.

[5] 3 Taunt. 157. [6] 2 Bing. 4.

TINDAL, C. J. I do not see any foundation for the distinction attempted to be made between the *latitat* and the writ of summons; for the *latitat* was never explained to the defendant, and the issuing the writ of summons which sets forth the cause of action has the same effect as filing a *latitat*. I think, therefore, this rule should be made absolute for computing the interest from the time of issuing the writ of summons.

The rest of the court concurring, the rule was made

Absolute accordingly.[1]

THOMPSON v. CLUBLEY.

IN THE EXCHEQUER, JANUARY 13, 1836.

[*Reported in* 1 *Meeson & Welsby*, 212.]

ASSUMPSIT by the indorsee against the acceptor of a bill of exchange for £200, drawn by one H. R., payable to his own order, and by him indorsed to the plaintiff.

Plea. That the bill of exchange was wholly made by H. R., at the request and for and by way of accommodation of and for the plaintiff, and was accepted by the defendant, at the request of H. R., for and by way of like accommodation of and for the plaintiff; and that, at the time of making and accepting the said bill of exchange, it was expressly agreed by and between the said parties that, if the said bill of exchange should happen to be outstanding at the time when it became due, it should be taken up and paid by the plaintiff, and that no claim or demand should at any time be made against the defendant or H. R., upon or in respect of it: concluding with a verification.

Replication. That before and at the time of the commencement of the suit, the plaintiff was, and still is, the holder of the said bill of exchange for good and sufficient consideration, in respect of his being the holder thereof; without this, that the said bill was either made or accepted by way of accommodation of or for the plaintiff, or that it was agreed by or between the parties, in manner and form as the defendant has above in the same plea in that behalf alleged; concluding to the country.

The case came on for trial at the sittings after Easter term, before

[1] Vaughan v. Goode, Minor, 417; Maxcy v. Knight, 18 Ala. 800; Bartlett v. Marshall, 2 Bibb, 467; Patrick v. Clay, 4 Bibb, 246; Hunt v. Nevers, 15 Pick. 500 (*semble*); Bishop v. Sniffen, 1 Daly, 155; Bank of Charlotte v. Davidson, 70 N. Ca. 118; Lang v. Brailsford, 1 Bay, 222, *accord*. — ED.

Lord Abinger, C. B., when the defendant, in support of his plea, called H. R., who stated that in the spring of 1833 he had occasion to raise money, and, having applied to an attorney to assist him, it was arranged between him and the plaintiff that the witness should give him the bill on which the present action was brought, but which should be taken up by the plaintiff, and that witness should receive bills of like value from the plaintiff, for which witness was to provide; and that the defendant had not received any value for his acceptance. It was objected, on the part of the plaintiff, that this evidence was inadmissible, as it went to contradict the written contract of acceptance, which purported to be an absolute engagement to pay the bill; whereas it was proposed to show that the acceptor was not to pay it, but that the plaintiff, who was the indorsee, was to take it up, and not to sue the acceptor, the effect of which was to make an entirely different contract. Foster *v.* Jolly [1] was relied upon as in point, but the objection was overruled. It was then contended that the exchange of bills between the plaintiff and H. R., the drawer and indorser, was sufficient consideration to entitle the plaintiff to sue the acceptor of the present bill. The learned judge, however, said that, in his opinion, this bill had really been taken by the plaintiff on a special contract by him not to sue the defendant, and, as that was proved by the evidence, the plea was made out. Whereupon, the plaintiff's counsel elected to be nonsuited, the learned judge giving him leave to move to enter a verdict for the amount of the bill, if the court should be of opinion that the plaintiff was entitled to recover.

G. Henderson now moved accordingly, on the grounds taken at the trial.

Sed per Curiam. This defence was clearly admissible, inasmuch as it showed that the acceptance was in truth for the accommodation of the plaintiff, and that all the parties put their names to the bill without consideration. With regard to the evidence being inconsistent with the terms of the instrument, we are of opinion that the agreement as to payment was collateral, and not part of the original contract. It was a collateral agreement that the plaintiff would not enforce the contract upon the bill. *Rule refused.*[2]

[1] 1 C. M. & R. 709.

[2] Cohen *v.* Goux, 48 Cal. 97; Trego *v.* Lowrey, 8 Nebr. 238; Murphy *v.* Keyes, 39 N. Y. Sup'r Ct. 18, *accord.*

See, to the same effect, Richmond *v.* Heapy, 1 Stark. 202; Johnson *v.* Peck, 3 Stark. 66; Sparrow *v.* Chisman, 9 B. & C. 241; —— *v.* Adams, Younge, 117; Quinn *v.* Fuller, 7 Cush. 224, in which cases the action was brought by a partnership upon paper given by the defendant for the accommodation of one of the partners.

The decision in these cases and in the principal case is in no way inconsistent with the familiar rule of law that the terms of a contract in writing cannot be varied by extrinsic evidence For in all of them the evidence was introduced not to vary

NORTON v. ELLAM.

IN THE EXCHEQUER, APRIL 21, 1837.

[*Reported in* 6 *Law Journal Reports, New Series, Exchequer*, 121.[1]]

THE declaration was on a promissory note in the following form: "I promise to pay £200 on demand, with lawful interest."

Plea: that the cause of action did not accrue within six years.

At the trial before Lord Abinger, C. B., at Westminster, at the sittings after Michaelmas term, a verdict was taken for the plaintiff, with liberty to move to enter a nonsuit, on the ground that the Statute of Limitations was a bar to the action, there having been no demand within six years of the date of the note.

Butt having obtained a rule accordingly,

Petersdorff now showed cause. A demand is necessary before the statute begins to run. The mere introduction of interest shows that it was probable some time was intended to elapse before demand. Barough *v.* White.[2] In Holmes *v.* Kerrison,[3] it was held that the statute did not run till the note had been presented for payment. This case is similar. Christie *v.* Fonsick, in Selw. N. P., differs as to this point in different editions. In the old cases, bringing an action was a

the contract of the defendant, but to show a defence upon the ground of the avoidance of circuity of action. For the plaintiff, as the party accommodated, having contracted to indemnify the defendant, would have to repay, as defendant in an action upon the contract of indemnity, whatever he might recover as plaintiff in an action upon the acceptance or note.

Evidence which would vary the terms of the contract of the acceptor or maker is always excluded, *e. g.*: —

ACCEPTOR. Adams *v.* Wordley, 1 M. & W. 374; Besant *v.* Cross, 10 C. B. 895; Campher *v.* Hodgson, Gow, 74; Young *v.* Austen, L. R. 4 C. P. 553; Cowles *v.* Townsend, 31 Ala. 133; Sylvester *v.* Staples, 44 Me. 496; Foster *v.* Clifford, 7 Reporter, 48 (Minn. 1878); Heaverin *v.* Donnell, 15 Miss. 244; Meyer *v.* Beardsley, 29 N. J. 236; Chaddock *v.* Vanness, 35 N. J. 520; Mason *v.* Graff, 35 Pa. 448; Foster *v.* Hall, 44 Wis. 568.

MAKER. Woodbridge *v.* Spooner, 3 B. & Al. 233; Moseley *v.* Hanford, 10 B. & C. 729; Foster *v.* Jolly, 1 C. M. & R. 708; Selden *v.* Meyers, 20 How. 506; Brown *v.* Spofford, 95 U. S. 474; Clark *v.* Hart, 49 Ala. 86; Guy *v.* Bibend, 41 Cal. 322; Henderson *v.* Thompson, 52 Ga. 149; Haley *v.* Evans, 60 Ga. 157; Walker *v.* Crawford, 56 Ill. 444; Potter *v.* Earnest, 45 Ind. 416; Atherton *v.* Dearmond, 33 Iowa, 353; Shaw *v.* Shaw, 50 Me. 94; McSherry *v.* Brooks, 46 Md. 103; Allen *v.* Furbish, 4 Gray, 504; Hyde *v.* Tenwinkel, 26 Mich. 93; Henshaw *v.* Dutton, 59 Mo. 139; True *v.* Shepard, 51 N. H. 501; Erwin *v.* Saunders, 1 Cow. 249; Payne *v.* Ladue, 1 Hill, 116; Holzworth *v.* Koch, 26 Oh. St. 33; Heist *v.* Hart, 73 Pa. 286; Isaacs *v.* Elkins, 11 Vt. 679; Morse *v.* Low, 44 Vt. 561; Knox *v.* Clifford, 38 Wis. 651.

[1] 2 M. & W. 461, s. c. — ED.

[2] 4 B. & C. 327; s. c. 3 Law J. Rep. K. B. 227. [3] 2 Taunt. 323.

demand, Rumball v. Ball;[1] but that is altered by the writ of summons, which is the present mode of commencing an action.

Butt, contra, referred to the 8th edition of Selwyn's N. P., where it is stated distinctly, "The statute runs from the date of the note, and not from the time of demand."

PARKE, B. There is no doubt on this point. In goods sold and delivered, payable on request, the statute runs at once. In case of money lent with interest at £5 per cent, no demand is necessary before bringing an action. There is no obligation in law to give any notice at all. A promissory note, payable on demand, is payable without any demand, and the statute runs from the date of it. Adding the words "with interest" makes no difference. A note payable at sight by the terms of the contract must be shown before action brought: that was the case of Holmes v. Kerrison.

ALDERSON, B. I am of the same opinion. There must be something to show that a demand is to be a collateral fact.

Rule absolute for entering a nonsuit.[2]

[1] 10 Mod. 38; s. c. Cro. Eliz. 548.

[2] Christie v. Fonsick, 1 Sel. N. P. (13 ed.) 801; Maltby v. Murrells, 5 H. & N. 813; State Bank v. Fox, 3 Blatchf. 481; Bartlett v. Rogers, 3 Sawyer, 62; Ziel v. Dukes, 12 Cal. 479; Bell v. Sackett, 38 Cal. 407; Dougherty v. Western Bank, 13 Ga. 287; Fankboner v. Fankboner, 20 Ind. 62; Rice v. West, 11 Me. 323; Young v. Weston, 39 Me. 492; Darnall v. Magruder, 1 Har. & G. 439; Field v. Nickerson, 13 Mass. 131, 137; Presbrey v. Williams, 15 Mass. 193; Little v. Blunt, 9 Pick. 488; Newman v. Kettelle, 13 Pick. 418; Burnham v. Allen, 1 Gray, 496; Jillson v. Hill, 4 Gray, 316; Easton v. McAllister, 1 Mo. 662; Thurston v. Wolfborough Bank, 18 N. H. 391 (*semble*); Larason v. Lambert, 7 Halst. 247; Niagara Bank v. McCracken, 18 Johns. 498; Haxtun v. Bishop, 3 Wend. 13, 21; Wheeler v. Warner, 47 N. Y. 519; Herrick v. Woolverton, 41 N. Y. 581, 591 (*semble*); Hirst v. Brooks, 50 Barb. 334 (overruling Scovil v. Scovil, 45 Barb. 517); Ormond v. Moye, 11 Ired. 564; Caldwell v. Rodman, 5 Jones (N. Ca.), 139; Hill v. Henry, 17 Oh. 9 (*semble*); Laforge v. Jayne, 9 Barr, 410; Cammer v. Harrison, 2 McC. 246; Smith v. Bythewood, Rice, 245; Wilks v. Robinson, 3 Rich. 182; Kingsbury v. Butler, 4 Vt. 458; Fisher v. Beckwith, 19 Vt. 31 (*semble*), *accord*.

In Wheeler v. Warner, *supra*, Peckham, J., delivering the opinion of the court, said, p. 520: "There is no divided opinion here or in England that upon such a note [*i. e.*, a note payable on demand], with or without interest, an action may be maintained against the maker without any demand because it is due. No demand can be sued before due; no action will lie upon any claim of any description arising upon contract before it is due. To say that the suit is the demand is to repeat an unmeaning phrase as thus used, which no number of repetitions can make sensible." See also Howland v. Edmonds, 24 N. Y. 307; Hope Ins. Co. v. Perkins, 2 Abb. App. 383 Hope Ins. Co. v. Weed, 28 Conn. 51.

It is a noteworthy fact that the notion that negotiable paper payable on demand is payable without a demand may be traced to the decisions in Capp v. Lancaster, Cro. El. 548; Rumball v. Ball, 10 Mod. 38; Collins v. Denning, 3 Salk. 227, in which cases,

RAMUZ v. CROWE.

IN THE EXCHEQUER, JUNE 7, 1847.

[*Reported in* 11 *Jurist*, 715.[1]]

THIS case was argued during the term on the 7th of June, before Pollock, C. B., Alderson, Rolfe, and Platt, BB., by

Udall, for the defendant, and

Hawkins, for the plaintiff. *Cur. adv. vult.*

Its nature fully appears from the judgment of the court, which was now delivered by

PLATT, B. In this action, the plaintiff in the third count declared as the drawer of a bill of exchange payable to his own order and accepted by the defendant.

The defendant pleaded that after the acceptance of the bill, and before the commencement of the suit, the plaintiff lost the bill out of his possession, that the bill remained lost until and at the time of the commencement of the suit, and that the plaintiff at the time of the commencement of the suit was not, nor was he at the time of the defendant's pleading, the holder or possessed of the bill.

The plaintiff replied that by reason of such loss alone he was not the holder of the bill; that the bill at the time it was so lost and at the time of the commencement of the suit had not been nor was indorsed by him, or transferable by delivery or capable of being enforced or put in suit against the defendant by any other person than

however, the instruments declared on were not negotiable, and where accordingly the rule that the debtor must seek the creditor was properly applied.

The absurdity of applying this rule to any negotiable paper is sufficiently obvious, and in the case of bank-notes is so glaring that the courts have felt obliged to make an exception to the rule, and to hold that a bank-note is not payable without a demand. Hinsdale *v.* Larned, 16 Mass. 65, 68 (*semble*); Tower *v.* Appleton Bank, 8 All. 387, 389 (*semble*); Thurston *v.* Wolfborough Bank, 18 N. H. 391; Wilks *v.* Robinson, 3 Rich. 182, 186 (*semble*); Bank of Memphis *v.* White, 2 Sneed, 482. But see Bryant *v.* Damariscotta Bank, 18 Me. 240 (*semble*); Bank of Niagara *v.* McCracken, 18 Johns. 498 (*semble*), (qualified in Jefferson Bank *v.* Chapman, 19 Johns. 322, 324); Haxtun *v.* Bishop, 3 Wend. 21 (*semble*); State Bank *v.* Van Horn, 1 South. 382; Greer *v.* Perkins, 5 Humph. 588, *contra*. And conf. Dougherty *v.* Western Bank, 13 Ga. 287, 297; Bethune *v.* Doherty, 30 Ga. 770; Kimbro *v.* Bank of Fulton, 49 Ga. 419.

Another exception to the rule of the principal case exists in regard to certificates by deposit, which are payable only after a demand. Fells Point Inst. *v.* Weedon, 18 Md. 320; Bellows Falls Bank *v.* Rutland Bank, 40 Vt. 377. But see Brummagim *v.* Tallant, 29 Cal. 503; Hunt *v.* Divine, 37 Ill. 137; Cate *v.* Patterson, 25 Mich. 191, *contra*. — ED.

[1] 1 Ex. 167, s. c. — ED.

the plaintiff; that until the loss he was always the holder, and from thence until and at the time of the commencement of the suit was alone entitled to be the holder thereof and to receive the amount thereof from the defendant; and that the defendant at the time of the commencement of the suit had due notice of the premises.

To this replication, the defendant demurred; and the question was whether, upon the facts stated in the pleadings, the plaintiff was entitled to recover, — in other words, whether the payee of a negotiable bill of exchange, having lost it, can on its arriving at maturity, without its production, maintain an action against the acceptor for recovery of its amount.

On the part of the defendant, it was contended, according to the doctrine laid down by the Court of King's Bench in Hansard *v.* Robinson, that by the custom of merchants the holder of a bill should present the instrument at its maturity to the acceptor, demand payment of its amount, and upon receipt of the money deliver up the bill; that the acceptor paying the bill has a right to the possession of the instrument for his own security, and as his voucher and discharge *pro tanto* in his account with the drawer; that to one who should refuse or be unable to deliver up the bill the acceptor is not bound to pay the sum therein specified.

The plaintiff, admitting the general rule of law, sought to except from its operation cases in which the plaintiff's inability to deliver up the bill resulted from his having lost it while it remained payable to his own order; and cited Rolt, Assignee of Welsford *v.* Watson,[1] Wain *v.* Bailey,[2] and Cunliffe *v.* Whitehead.[3]

The first and third of these cases, however, do not appear to support the alleged exception.

The note in Wain *v.* Bailey was not negotiable: it was not made payable to order or to the bearer, but to the plaintiff only, who therefore alone could enforce the payment.[4]

In Cunliffe *v.* Whitehead, the plaintiff did not show in his declaration that he was indorsee of the bill, but the bailee from a third person to whom it had been indorsed; and the court held that as such mere bailee he had not any right of action.

[1] 4 Bing. 273. [2] 10 Adol. & Ell. 616. [3] 3 Bing. N. C. 828; 5 Scott, 31.

[4] Although instruments which contain no words of negotiability have been held by an anomaly to possess some of the peculiar incidents of bills and notes, *supra*, p. 77, note 6, they are strictly not to be distinguished from ordinary contracts in writing, to which of course the doctrine of the principal case has no application. In accordance with Wain *v.* Bailey, see Charnley *v.* Grundy, 14 C. B. 608; Price *v.* Price, 16 M. & W. 243; Mossop *v.* Eadon, 16 Ves. 430; Price *v.* Dunlap, 5 Cal. 483; Cleveland *v.* Worrell, 18 Ind. 545; Nagel *v.* Mignot, 7 Mart. 657, 8 Mart. 488; Clark *v.* Reed, 20 Miss. 554; Wofford *v.* Police Board, 44 Miss. 579; Pintard *v.* Tackington, 10 Johns. 104; Blade

The general rule is supported by Lord Eldon's observations in the case *Ex parte* Greenway,[1] and the decisions in Pierson *v.* Hutchinson,[2] Bevan, widow, *v.* Hill, Mayor and others *v.* Johnson and another,[3] Poole *v.* Smith,[4] Dangerfield *v.* Wilby,[5] Davis *v.* Dodd,[6] and Champion *v.* Terry.[7] On the other hand, Long *v.* Bailie,[8] Glover *v.* Thompson,[9] and Dart *v.* Hinckes and Rolt *v.* Watson, quoted respectively by the plaintiff's counsel in Hansard *v.* Robinson, are authorities in support of the exception.

But in the discussion of Hansard *v.* Robinson all those cases were brought before the Court of King's Bench; and that court, after taking time to consider, overruled such of them as supported the exception, and decided, as we think properly, that according to the custom of merchants the acceptor of a negotiable bill was not bound to pay, unless the party demanding payment produced, and offered to deliver up, the instrument itself.

This decision governs the present case. The bill accepted by the defendant was negotiable; and the plaintiff, by reason of his loss of it being unable to produce it to the defendant, cannot by the law-merchant compel him to pay the amount.

As to the third count, therefore, the defendant is entitled to judgment on the demurrer. *Judgment for the defendant.*[10]

v. Noland, 12 Wend. 178; Rowley *v.* Ball, 3 Cow. 303; Wright *v.* Wright, 54 N. Y. 437; Bishop *v.* Sniffen, 1 Daly, 155; Lazell *v.* Lazell, 12 Vt. 443; Hough *v.* Barton, 20 Vt. 455. — Ed.

[1] 6 Ves. Jr. 812. [2] 2 Camp. 211. [3] 3 Camp. 324.
[4] Holt, N. P. C. 144. [5] 5 Esp. 159. [6] 4 Taunt. 602.
[7] 7 B. Moo. 130; 3 B. & B. 295. [8] 2 Camp. 214.
[9] R. & M. 403.

[10] Savannah Bank *v.* Haskins, 101 Mass. 370, 377 (*semble*); Grant *v.* Reid, 1 Jones (N. Ca.), 512, *accord*.

Long *v.* Bailie, 2 Camp. 214, n. (*overruled*); Chandron *v.* Hunt, 3 Stew. 81; Branch Bank *v.* Tillman, 12 Ala. 214; Rogers *v.* Miller, 5 Ill. 333 (*semble*); Depew *v.* Wheelan, 6 Blackf. 485; Dean *v.* Speakman, 7 Blackf. 317; Rowley *v.* Ball, 3 Cow. 303; Aborn *v.* Bosworth, 1 R. I. 401; Lazell *v.* Lazell, 12 Vt. 443 (*semble*); Hopkins *v.* Adams, 20 Vt. 407 (*semble*), *contra*.

In Mayor *v.* Johnson, 3 Camp. 324, 325; Champion *v.* Terry, 3 B. & B. 295; Woodford *v.* Whiteley, M. & M. 517; and Pierson *v.* Hutchinson, *supra*, p. 18, a distinction was suggested between the loss and the destruction of a bill in reference to the rights of the holder; and in Wright *v.* Lord Maidstone, 1 Kay & J. 701, Wood, V. C., dismissed a bill filed by the holder of a bill that had been destroyed, on the ground that the plaintiff had an adequate remedy at law. It seems clear, however, that the *ratio decidendi* of Hansard *v.* Robinson and Ramuz *v.* Crowe applies with equal force to cases of destroyed bills, and this view seems to have been adopted in England. "It is settled that the owner of a *destroyed* bill or note, if negotiable, cannot *at law*, recover against the other parties, whether the bill be actually indorsed or not. Nor can he even sue on the consideration." Byles, Bills (11th ed.), 375. See also Welton

BLACKIE v. PIDDING.

IN THE COMMON PLEAS, MAY 26, 1848.

[*Reported in* 11 *Law Times*, 203.[1]]

ASSUMPSIT on a bill of exchange, and on an account stated.

Pleas: 1. That defendant did not accept; 2. *Non assumpsit.*

The bill was accidentally burned; and it was contended that the defendant was not bound therefore to pay, and that the plaintiff's

v. Adams, 4 Cal. 87; Fisher v. Mershon, 8 Bibb, 527; Dumas v. Powell, 2 Dev. & B. Eq. 122; Irwin v. Planters' Bank, 1 Humph. 145.

But, in the United States, the courts have generally permitted a plaintiff to recover at law upon proof of the destruction of the bill. Sebree v. Dorr, 9 Wheat. 558; Renner v. Bank of Columbia, 9 Wheat. 581; Palmer v. Logan, 4 Ill. 56; Rogers v. Miller, 5 Ill. 333 (*semble*); Dean v. Speakman, 7 Blackf. 317; Wade v. N. Orleans Co., 8 Rob. (La.) 140; Moore v. Fall, 42 Me. 450; Edwards v. McKee, 1 Mo. 123; Vanauken v. Hornbeck, 2 Green, 178; Rowley v. Ball, 8 Cow. 808; Des Arts v. Leggett, 16 N. Y. 582; Aborn v. Bosworth, 1 R. I. 401; Anderson v. Robson, 2 Bay, 495; Moses v. Trice, 21 Grat. 556 (qualifying Davis v. Miller, 14 Grat. 1, 14 (*semble*)).

Conf. Bank of Louisville v. Summers, 14 B. Mon. 306; Tower v. Appleton Bank, 8 All. 387.

The voluntary destruction of a bill or note by the holder precludes him from all right to recover on the instrument either at law or in equity. U. S. Bank v. Sill, 5 Conn. 106; Fisher v. Mershon, 8 Bibb, 527 (*semble*); Allen v. State Bank, 1 Dev. & B. Eq. 8 (*semble*); Blade v. Noland, 12 Wend. 173.

It has been held that the owner of a bank-note which has been cut in halves for safety in transmission may maintain an action at law against the bank, upon production of one of the halves and proof of the loss of the other. Redmayne v. Burton, 2 L. T. Rep. 824 (*semble*); Bullet v. Bank of Pa., 2 Wash. C. C. 172; Martin v. U. S. Bank, 4 Wash. C. C. 253; Armat v. Union Bank, 2 Cranch, C. C. 180; U. S. Bank v. Sill, 5 Conn. 106; State Bank v. Aersten, 4 Ill. 135; Hinsdale v. Bank of Orange, 6 Wend. 378; Patton v. State Bank, 2 N. & McC. 464; Union Bank v. Warren, 4 Sneed, 167; Hopkins v. Adams, 20 Vt. 407, 411 (*semble*). But it would seem that the holder of a half-note can have no greater rights than the owner of an overdue or unindorsed note, and that he should resort to a court of equity for relief.

See Commercial Bank v. Benedict, 18 B. Mon. 307; Murdock v. Union Bank, 2 Rob. (La.) 112; Little v. Consol. Assoc., 2 La. An. 1012; Allen v. State Bank, 1 Dev. & B. Eq. 8; Streater v. Cape Fear Bank, 2 Jones, Eq. 81 (*semble*); Bank of Va. v. Ward, 6 Munf. 166; Farmers' Bank v. Reynolds, 4 Rand. 186. Conf. Mayor v. Johnson, 8 Camp. 324; Mossop v. Eadon, 16 Ves. 430; Smith v. Mundy, 8 E. & E. 22.

It is conceived that there might be cases where the holder of a half-note might be without remedy, either at law or in equity, from inability to give adequate indemnity, *e. g.* where his half and the lost half have no duplicate number or other common mark to distinguish them from other notes of the same date and denomination. But see Murdock v. Union Bank, 2 Rob. (La.) 112; and conf. Tower v. Appleton Bank, 8 All. 287; Irwin v. Planters' Bank, 1 Humph. 145. — ED.

[1] 6 C. B. 196, s. c. — ED.

only remedy was in equity. A verdict having been given for the plaintiff, and a rule obtained to set the verdict aside, and to enter a nonsuit, *Miller* showed cause, and *C. Jones*, Serjt., supported the rule. Cases cited: Hansard *v.* Robinson and Wain *v.* Bailey.[1]

The court held that the objection was not open on the pleadings, and that the presiding judge at the trial was right in receiving secondary evidence of the bill. *Rule discharged.*[2]

WALKER *v.* HAMILTON.

IN CHANCERY, BEFORE LORD CAMPBELL, C., AND SIR JAMES LEWIS KNIGHT BRUCE, AND SIR GEORGE JAMES TURNER, LJJ., APRIL 21, 1860.

[*Reported in* 1 *De Gex, Fisher, & Jones*, 602.]

THIS was a special case, originally argued in part before the Lords Justices, and then transferred to the paper of the full court, their lordships deeming the question raised upon the special case of sufficient importance to warrant its being reargued before the full court.

The case stated in substance as follows: —

In and prior to the year 1854, Messrs. Morewood & Rogers carried on business as copartners in London, and at Melbourne in Australia. They had at the same time extensive dealings with various persons in the United States of America as purchasers of cotton, and at various times previously to and in the year 1854 sent commissions to the defendant, Adolphus Hamilton, a broker and merchant, residing at New Orleans in the State of Louisiana, to purchase on their behalf large quantities of cotton to be consigned to them in England. In pursuance of these commissions, the defendant Hamilton from time to time purchased and consigned the required quantities of cotton on account of Messrs. Morewood & Rogers, and drew upon them bills of exchange for the amount of the cost of the cotton, commission, and other usual expenses

[1] 10 A. & E. 616.

[2] Charnley *v.* Grundy, 14 C. B. 608 (*semble*), *accord.*

So, where the defendant, by suffering a default, constructively admits the making of the bill or note declared on, the production of a copy verified by affidavit will entitle the plaintiff to recover the principal and interest, although the original has been lost or destroyed. Brown *v.* Messiter, 3 M. & Sel. 281; Flight *v.* Brown, 2 Tyr. 312; Allen *v.* Miller, 1 Dowl. 420; Clarke *v.* Quince, 3 Dowl. 26. But see Brandt *v.* Foster, 5 Iowa, 287.

And, if interest is not claimed, it is unnecessary to produce either the original or a copy of the bill or note. Davis *v.* Barker, 3 C. B. 606; Lane *v.* Mullins, 2 Q. B. 254; Chaplin *v.* Levy, 9 Ex. 531 (*semble*). Conf. Hutton *v.* Ward, 15 Q. B. 26; Fryer *v.* Brown, Ry. & M. 115. — ED.

incurred in purchasing and consigning it. All such bills of exchange as were drawn prior to the 4th October, 1854, were duly accepted and paid by Messrs. Morewood & Rogers. In addition to the bills so accepted and paid, Hamilton, in the months of October and November, 1854, drew at New Orleans thirty-six bills of exchange, for sums amounting in the whole to £35,630 5*s.* 6*d.*, on Messrs. Morewood & Rogers, who were then indebted to him in a larger amount. All these bills were drawn payable to the order of Samuel C. Bell, as the cashier of a joint-stock company established at New Orleans, called the New Orleans Canal and Banking Company.

One of these bills was dated the 4th October, 1854, and was in the following form: —

"Exchange for £1,000 sterling, New Orleans, October 4, 1854.

"Sixty days after sight of this first of exchange, second and third unpaid, pay to the order of Samuel C. Bell, cashier, £1,000 sterling, value received, and charge the same to account of Messrs. Morewood & Rogers, London.

"ADOLPHUS HAMILTON."

The other bills were similar in form.

All these bills were, at the times when they were respectively drawn, transferred by Hamilton to the New Orleans Canal and Banking Company, and subsequently and before acceptance indorsed and transferred by or on behalf of the company to various persons.

All the bills were duly accepted in London by Messrs. Morewood & Rogers, at dates between the 1st and 23d November, 1854.

On the 2d January, 1855, Messrs. Morewood & Rogers stopped payment; and on the 26th January, 1855, for the purpose of carrying into effect an arrangement previously made by them with their creditors, they executed to the plaintiffs, as trustees for themselves and the several other persons parties thereto of the third part, creditors of the said Messrs. Morewood & Rogers, the ordinary deed of assignment of all their estate and effects for distribution amongst such creditors, in satisfaction of their debts in proper order and proportion, and as such debts would be paid, in case the insolvents had become bankrupts.

At various dates between the 3d and 25th of January, 1855, the thirty-six bills of exchange were respectively, as they became due and payable, presented in London for payment to Messrs. Morewood & Rogers, who, under the circumstances above stated, were unable to pay them; and the bills thereupon were respectively duly protested for non-payment.

The deed of arrangement of the 26th January, 1855, was, at various times afterwards, executed by the whole of the creditors of Messrs. Morewood & Rogers, including the defendant, Hamilton.

On the 26th January, 1855, the whole of the bills protested for non-payment were paid in London, *supra* protest, for the honor of the New Orleans Canal and Banking Company, by Messrs. Overend, Gurney, & Co., of London, and by them subsequently transferred to the New Orleans Canal and Banking Company; and the company, by their duly authorized agent, afterwards executed the deed of arrangement of the 26th January, 1855, as claimants in respect of the bills thus transferred to them.

On the return of the dishonored bills to New Orleans, the defendant Hamilton paid to the New Orleans Canal and Banking Company the amount of the bills, with the addition of £10 per cent damages in lieu of re-exchange on such amount, which, as the drawer in New Orleans of the bills, he was liable by the law of the State of Louisiana to pay in consequence of such bills having been protested for non-payment by the acceptors in England, together with interest on the respective amounts of the bills and damages from the time of protest.

The defendant Hamilton claimed to be admitted as a creditor under the deed of arrangement, not only for the amount of the dishonored bills, but also for the £10 per cent damages thereon, amounting to £3,563, but not in respect of interest on the bills or any of them.

The plaintiffs, as trustees of the deed of arrangement, had admitted proof by the defendant Hamilton, and paid dividends to him in respect of the amount of the bills, such dividends having been paid and received without prejudice to the claim of Hamilton to be admitted as a creditor for the sum of £3,563 for damages.

The question for the opinion of the court was whether the defendant, Adolphus Hamilton, was entitled to be admitted as a creditor under the deed of arrangement in respect of the sum of £3,563 paid by him for damages on the return to New Orleans of the bills of exchange drawn by him on Messrs. Morewood & Rogers, and accepted but dishonored by them and protested for non-payment, as above mentioned, or for any other sum for damages paid by him on the bills, or any of them.

Mr. Daniel and *Mr. Wickens*, for the plaintiffs. The acceptor is not, upon non-payment of a bill, liable to the holder for any thing more than the principal sum and the expenses of the protest and interest thereon from the time of maturity of the bill, and not liable for re-exchange. Story on Bills of Exchange,[1] Napier *v.* Schneider,[2] Woolsey *v.* Crawford.[3] There is no obligation on the acceptor, except

[1] § 398.

[2] 12 East, 420.

[3] 2 Camp. 445. [May 28, 1810. "This was an action on a bill of exchange, drawn by I. S. Crawford at Quebec, upon, and accepted by, the defendant in England. The declaration stated that the plaintiff, who was payee of the bill, had indorsed it

that created by the custom of merchants; and that custom does not give a right to an indorser or holder to recover re-exchange. Dawson v. Morgan.[1] The only question is, whether by the law of England the acceptor's liability to the drawer is different from what it is to the holder or indorser. It is submitted not. In Francis v. Rucker,[2] Lord Camden allowed the drawer of a bill, which had been drawn in pursuance of orders of the acceptors, to prove his debt, including re-exchange, against the acceptors, who had become bankrupt. But, in that case, Lord Camden is supposed to have proceeded merely on the special act of the colony in which the bills were drawn, providing that bills which should be returned should be paid with twenty per cent beyond the amount of the original bills. *Ex parte* Moore, *Re* Tyler.[3] By the general law there is no distinction between the rights of the drawer and the rights of the holder or indorser as against an acceptor. Cooke's Bankrupt Laws,[4] Kent's Commentaries.[5] And by that law the acceptor is not liable for re-exchange to the holder, though the latter may have paid it as indorser, and although it be a liquidated sum. Woolsey v. D. Crawford. The mode of payment of the bills, and the consequences of non-payment, are governed by the law of the country in which the payment was contracted to be made. Cooper v. The Earl of Waldegrave.[6] Moreover, in Francis v. Rucker,[2] Lord Camden considered that the twenty per cent was made by the act of the colony a liquidated demand, and therefore distinguishable from re-exchange, the difference upon which was an uncertain damage. In the present case, the £10 per cent is made payable in lieu of, and stands on the same footing as, re-exchange, and cannot be regarded

in Canada; and that, in consequence of its returning to that country dishonored, he had been compelled to pay to the indorsee £10 per cent upon the amount as re-exchange, and £6 per cent interest from the time it became due, together with other charges.

Park undertook to prove these facts, and contended that the defendant was answerable for all the damage that had been suffered by the plaintiff, from the bill being dishonored.

Lord Ellenborough. You may as well state that, by reason of the bill not being paid, the plaintiff was obliged to raise money by mortgage. You must proceed for re-exchange against the drawer. He undertakes that the bill shall be paid, or that he will indemnify the holder against the consequences. The acceptor's contract cannot be carried farther than to pay the sum specified in the bill, and interest according to the legal rate of interest where it is due. *Verdict accordingly.*"]

Napier v. Schneider, 12 East, 420; Hanrick v. Farmers' Bank, 8 Port. 539; Manning v. Kohn, 44 Ala. 343; Bowen v. Stoddard, 10 Met. 379; Watt v. Riddle, 8 Watts, 545, *accord*. — Ed.

[1] 8 B. & C. 618.
[2] Amb. 672.
[3] 2 Bro. C. C. 597.
[4] Page 194.
[5] Vol. 3, pp. 153, 154.
[6] 2 Beav. 282.

as damages, technically speaking, liquidated, any more than the re-exchange itself. On this second ground, therefore, the present case is also distinguishable from Francis *v.* Rucker;[1] and we submit, on both grounds, that the proposed proof cannot be admitted.

Mr. Bacon and *Mr. W. F. Robinson*, for the defendant Hamilton. If Francis *v.* Rucker[1] be law, our right of proof for the sum claimed cannot be disputed. The engagement entered into by the acceptors of the bills was to pay the bills, or the £10 per cent, the consequent damages according to the law of Louisiana, in the same manner as if they had expressly stipulated to do so. The sum payable for damages has relation, when it accrues, to the original transaction, and becomes part of the debt. In *Ex parte* Moore, *Re* Tyler,[2] Lord Thurlow admitted the authority of Francis *v.* Rucker,[1] but drew a distinction between it and the case before him, on the ground that proof in bankruptcy could only be admitted for damages existing at the time when the act of bankruptcy was committed; but that distinction now no longer exists. The Bankrupt Law Consolidation Act, 1849.[3] The two decisions are not inconsistent. In the other cases cited, the question was between the holder and acceptor, not between the drawer and acceptor of the bills. This claim is for damages, which may fairly and reasonably be considered as arising naturally, *i. e.* according to the usual course of things, from the breach of contract to pay the bills, or which may reasonably be supposed to have been, in the contemplation of both parties when they made the contract, the probable result of the breach of it. It is a claim, therefore, which would be recoverable at common law. Hadley *v.* Baxendale.[4] Where a bill of exchange is drawn in one country and payable in another, and is dishonored, the drawer is liable according to the *lex loci contractus*, and not according to that of the country in which the bill is made payable. Allen *v.* Kemble.[5]

Mr. Daniel replied.

The Lord Chancellor. *Mr. Daniel* has done all that could be done in support of the case of those who have the good fortune to have him for their advocate; but I must say that I think the merits are decidedly against him. I am clearly of opinion that Mr. Hamilton had a right to prove for this £10 per cent under the deed. It would be a great injustice if he had not. He is employed by Messrs. Morewood & Co. to buy goods for them upon commission, to send these goods to Liverpool in the United Kingdom; and he is desired by them to draw bills upon them for the price of the goods and commission, which they undertake to accept and to pay. He does buy the

[1] Amb. 672. [2] 2 Bro. C. C. 597. [3] § 178.
[4] 9 Exch. 341. [5] 6 Moore, 314.

goods; he does draw the bills. The bills are accepted, and, when due, are dishonored; and then what is the situation of Mr. Hamilton? He is sued, and obliged to pay the amount of the £10 per cent in consequence of a law subsisting in Louisiana, where the bills were drawn or where the transaction took place. He being thus out of pocket in respect of the sum that he had paid as well as in respect of his services as a commission merchant, and having actually paid the £10 per cent, it is alleged that under this deed of composition, executed between these gentlemen and their creditors, he has no remedy for the £10 per cent which he so paid. It would be a great injustice that he should lose the sum which he has paid in obeying their commands. As the case was ingeniously put by *Mr. Robinson*, they asked him to be their surety; and he became their surety by drawing the bills, and in that character was called on to pay. But a surety has a right against his principals to be recouped what he has paid as surety at their request.

Therefore, according to law and justice, this demand ought to be satisfied, and upon this general principle, that it is a damage naturally flowing from the breach of the contract. Where there is a contract, the party who breaks that contract is liable for what may be considered the natural and proximate consequence of that breach of contract. Here was a promise to pay the bills when they became due; that promise was broken: the payment of the £10 per cent was the natural and direct consequence of that breach of contract; and therefore the party to whom that promise was made, and who suffered from that breach of the promise, is very ill used if he has not a right to be indemnified in respect of the loss which he has thus sustained.

This reasoning, I think, applies generally to the drawer of a bill in a foreign country on an acceptor in another foreign country, where there may be a re-exchange or some law giving a fixed sum in payment of exchange; because what is paid under that law in lieu of re-exchange is a necessary consequence of the breach of contract on the part of the acceptor of the bill, and I have no doubt that in an action at law in an English court it might be recovered, on setting out the acceptance, the dishonor, and *per quod* that the plaintiff was compelled to pay the £10 per cent to the holder of the bill.

That seems to me to be the correct principle; and we have the authority of Pothier[1] for its being the law of France, and it has been, I believe, since included in the commercial code of the Code Napoleon.[2] We have the authority of Story, the great jurist,[3] who gives countenance to that doctrine; and we have that which *Mr. Daniel* was unable

[1] Pothier, Contrat d'Exchange, par Dupin, pl. 117.
[2] Code de Commerce, liv. 1, tit. 8, § 18.
[3] Story on Bills of Exchange, § 398.

to cope with, viz., the express authority of an English court of justice in the case of Francis *v.* Rucker,[1] which is expressly in point with the present. It was a case that was well considered by Lord Camden, who so felt the great importance of it that, in order to settle the law solemnly and finally, he was not satisfied to do what I believe he might have done in bankruptcy, but he directed a bill to be filed, so that his opinion might be reviewed, and the opinion of the House of Lords, if necessary, taken upon it. His decision, however, was not appealed against. It has, I believe, been considered law ever since, and is, in my opinion, consistent with reason and good sense.

If there had been subsequent decisions which were at variance with it, we might have been bound by the more recent authorities; but, notwithstanding all the diligence which has been exercised by *Mr. Daniel* and his learned junior, they have brought no single authority that directly conflicts with that case, because in *Ex parte* Moore [2] the proof was allowed. Some observations were made by Lord Thurlow respecting Francis *v.* Rucker,[1] but he acquiesced in it, and the proof was allowed. In Napier *v.* Schneider, a gentleman at the bar asked for a reference to the Master as to the amount that was due on a bill of exchange and for re-exchange (not £10 or £20 per cent or any given percentage), and the court held that the Master was not competent to enter into all this calculation. But, if it had been a fixed sum of £10 per cent, the Master would have had no difficulty; and I am inclined to believe that in such a case the counsel who made the application would have succeeded, instead of failing. The case of Woolsey *v.* D. Crawford is at most a *nisi prius* case, and the point there decided only applied to the re-exchange, not to a sum which was liquidated, which could have been easily ascertained; and as to this *nisi prius* case, if it had been expressly in point, I should have said that it could not at all outweigh the solemn decision of Francis *v.* Rucker.[1] But the case before us is distinguishable from it, because it is only there said that a claim in respect of re-exchange could not be admitted, and here we are not upon re-exchange, but upon a liquidated sum of £10 per cent. I do not therefore find any authority at all to conflict with the case of Francis *v.* Rucker,[1] and upon that I think we may safely decide in favor of this demand.

THE LORD JUSTICE KNIGHT BRUCE. I also think that the first and main branch of the question must be answered in the affirmative.

THE LORD JUSTICE TURNER. I say nothing as to how this case would stand as between a holder and the acceptors, because that is not the case before us; but as between the drawer and the acceptors, in

[1] Amb. 672. [2] 2 Bro. C. C. 597.

my opinion, there is a liability in the acceptors which would have been provable under a bankruptcy. Therefore, the case of Francis v. Rucker[1] is distinct upon the point; and I do not think that that authority, after having examined the petition which was presented in the bankruptcy, is confined at all to the special circumstances of the particular case. Whatever the effect of the cases at law may be, as between the holder and the acceptor, they do not, in my judgment, affect the case as between the drawer and the acceptor; and in my opinion, therefore, our answer must be in the affirmative.[2]

[1] Amb. 672.

[2] Francis v. Rucker, Amb. 672; Prehn v. Royal Bank, L. R. 5 Ex. 92; Larios v. Guretz, L. R. 5 P. C. 346; *In re* General South American Co., 37 L. T. Rep. 599; 26 W. R. 232, s. c.; Riggs v. Lindsay, 7 Cranch, 500; Bowen v. Stoddard, 10 Met. 379, *accord*.

In *In re* General South American Co., *supra*, Malins, V. C., said (p. 600): "One point I have had argued at considerable length is that, although a drawer is liable for this re-exchange, — because, if this is not a re-exchange, it is a substitution for re-exchange, and it is immaterial whether it is in the strict sense of the word re-exchange or something by way of substitution, — an acceptor is not. The only authorities appealed to for that are the two cases of Woolsey v. Crawford and Napier v. Schneider. First, whatever the decision may be, I think, after the case in the Court of Appeal of Walker v. Hamilton, those authorities must be considered as entirely overruled. Lord Campbell, in giving his judgment, does not say that he overrules them; but he speaks of one of them as a *nisi prius* decision, and of the other as a case in which, if certain things had been known, the result would have been different; and, as Mr. Pearson stated, both of them were cases not of a drawer, but of a holder or payee of the bill. Now, I cannot in the smallest degree accede to the argument that the drawer of a bill is under a greater liability than the acceptor. I have always understood, and I think every man who has the slightest knowledge of mercantile affairs must always understand that the person primarily liable on a bill of exchange is the acceptor. The liability of the drawer is a secondary liability, and so is that of the indorser. Therefore, I am perfectly satisfied upon every principle that, if it is possible, as it would be, that a drawer would be liable for this exchange, it must necessarily follow that an acceptor must be so also." In Brown v. Stoddard, *supra*, the court said, p. 379, *per* Hubbard, J.: "No other agreement exists between the holder and the acceptor than a single engagement by the acceptor to pay the face of the bill at maturity. And, if he fails to perform his engagement, he is liable, in an action, for the amount of the bill and interest, and the costs of protest for non-payment. But he is not liable for damages. It is no part of his contract to pay them; and the bill, when satisfied by him, is paid at the place where it was made payable, and the party does not require, nor is he in such case entitled to, the damages for the re-exchange. . . .

"In cases where drawers have been obliged to take up bills and pay the damages, because the acceptors suffered them to be protested, when they had funds of the drawers in their hands, and were, as between themselves and the drawers, bound to accept, they may recover such damages of the acceptors; because the loss is occasioned by their default and neglect. This rests, however, on the relations existing between them, and not on the ground that an acceptor, as such, is liable to pay damages by reason of his acceptance." — Ed.

ASPITEL *v.* BRYAN.[1]

In the Exchequer Chamber, June 14, 1864.

[*Reported in* 33 *Law Journal Reports, Queen's Bench*, 328.[2]]

This was an appeal from the decision of the Court of Queen's Bench in favor of the plaintiff.

The plaintiff was the executor of one James Peto, who died in 1862, and he sued on a bill of exchange as drawn in 1860 by John Peto, accepted by the defendant, and indorsed by John Peto to James Peto.

John Peto, who died in 1859, had a clerk named Collins. Collins, after John Peto's death, acting with the consent of James Peto, a relative, sold to the defendant a quantity of goods belonging to John Peto's estate. In consideration of this sale, and by arrangement between Collins, the defendant, and James Peto, Collins drew and indorsed the bill in question in the name of John Peto, using the words, "John Peto, *per pro.* John Collins." The defendant accepted the bill after it was indorsed. The bill was kept by James Peto in his own possession till his death, when the plaintiff put it in suit. The defendant repeatedly, by letter to James Peto, promised to pay the bill. In the declaration there was a count on an account stated. The only pleas left on the record when the case came to this court were: the plea that John Peto did not indorse the bill, and also the general issue to the account stated. The Court of Queen's Bench held that the defendant was estopped from saying that the indorsement was not John Peto's, and found for the plaintiff.

Rochfort Clarke, for the defendant (the appellant), urged on the court that this bill of exchange was not a negotiable instrument in the hands of James Peto; that James Peto had no interest in the goods; that he never had possession of them; that they were sold by Collins, and not by himself; that the defendant was not estopped from saying that the bill was not indorsed by John Peto; that the defendant was liable to John Peto's personal representative for the price of the goods, and ought not to be required to pay for them twice; that James Peto's position was in no way altered by the giving of the bill of exchange; and, if it were to be said that the defendant and James

[1] *Coram* Pollock, C. B., Williams and Willes, JJ., and Bramwell and Channell, BB.

[2] 5 B. & S. 723, s. c. — Ed.

Peto had agreed together that the bill should be drawn and indorsed in the name of the deceased John Peto, the answer was that there was no consideration for any such agreement on the part of the defendant, and that therefore he was not estopped from saying that the indorsement was not the indorsement of John Peto. He cited Mountford *v.* Gibson,[1] Nelson *v.* Serle,[2] Minet *v.* Fector,[3] Barlow *v.* Bishop, Smith *v.* Marsack, Drayton *v.* Dale, Sanderson *v.* Collman,[4] Bowman *v.* Taylor,[5] Vooght *v.* Winch,[6] Swan *v.* The North British Australian Company,[7] Pickard *v.* Sears,[8] and Freeman *v.* Cooke.[9]

Hayes, Serjt., for the respondent (the plaintiff), was not heard.

POLLOCK, C.B. With reference to the last remark of Mr. Rochfort Clarke, I will refer to the case, from which it appears that there was, in fact, a sale of the goods in question from James Peto to the defendant. There was, therefore, a valuable consideration for the agreement between them. The whole transaction was perfectly fair and reasonable. We all agree that there may arise an estoppel by agreement, and that such an estoppel arises here. The parties agree to give the transaction this character, that the defendant should appear to have bought the goods of John Peto, and that, therefore, the bill should be drawn and indorsed in the name of John Peto. He now says that the bill was not indorsed by John Peto, he having accepted the bill after it had been drawn and indorsed in that name. With regard to the count on the account stated, the bill itself, and the defendant's repeated promises to pay, afford unquestionable evidence for the plaintiff. The judgment below must be affirmed.

The other judges concurred. *Judgment affirmed.*[10]

[1] 4 East, 441.
[2] 4 Mee. & W. 795; s. c. 8 Law J. Rep. (N. S.) Exch. 305.
[3] 1 H. Black. 569.
[4] 4 M. & G. 209; s. c. 11 Law J. Rep. (N. S.) C. P. 270.
[5] 2 Ad. & E. 278; s. c. 4 Law J. Rep. (N. S.) K. B. 58.
[6] 2 B. & Ald. 662.
[7] 7 Hurl. & N. 603; s. c. 31 Law J. Rep. (N. S.) Exch. 425.
[8] 6 Ad. & E. 469.
[9] 2 Exch. Rep. 654; s. c. 18 Law J. Rep. (N. S.) Exch. 114.
[10] In Douglass *v.* Hall, 22 Vt. 451, it was held that a note payable to the late firm of C. C. & Co., being in effect payable to the surviving members of partnership, might be indorsed by them in the name of C. C. & Co. In Foster *v.* Shattuck, 2 N. H. 446, a note made payable to Moses Foster, but with no design of delivering it to him, was actually given to Samuel Foster. The note was indorsed by name of Moses Foster. It was held that Samuel might sue upon it, as upon a note payable to bearer. This seems clearly erroneous. See Wayman *v.* Torreyson, 4 Nev. 124; Hinterberger *v.* Weindler, 2 Bradwell, 407; but he might have sued as payee of the name of Moses F. — ED.

PHILLIPS v. IM THURN.

IN THE COMMON PLEAS, MAY 8, 1865.

[*Reported in* 11 *Jurist, New Series*, 489.[1]]

DECLARATION: For that heretofore, to wit, on the 12th May, 1864, certain persons under the name and style of Canevaro & Co., in parts beyond the seas, to wit, at Lima, made their bill of exchange in writing, and directed the same to one H. H. Suttybuger, and thereby required the said H. H. Suttybuger, at sixty days' sight, to pay by their first of exchange (second and third not being paid), to order of Carlos Raffo, the sum of £400 sterling; and the said Carlos Raffo then indorsed the said bill to one Enrique Plana, who then indorsed the same to the plaintiffs; and the said bill was duly presented to the said H. H. Suttybuger for acceptance; and he then saw, but did not, nor would, then or at any other time, before or afterwards, accept the same, or the said second or third of exchange in the said bill mentioned; whereupon the said bill was duly protested for non-acceptance thereof; of all which the defendant had then due notice; and thereupon the defendant, in order to prevent the said bill from being sent back and returned to the said Canevaro & Co., did, under the said protest, according to the custom of merchants, accept the said bill for the honor of the said Canevaro & Co., and the said H. Suttybuger did not, and has never paid the said bill, or the said second or third of exchange in the said bill mentioned, or any part thereof, although more than sixty days had, before suit, elapsed from the time when the said bill was so seen and accepted by the defendant as aforesaid, and although the said bill was duly presented to the said H. H. Suttybuger and the defendant for payment when it became due; whereupon the said bill was duly protested for non-payment thereof, of all which premises the defendant then had due notice; and although all conditions have been fulfilled, and all times have elapsed, necessary to entitle the plaintiffs to maintain this action against the defendant in respect of the breach hereinafter alleged, and nothing happened to prevent the plaintiffs from maintaining this action for the same, yet the defendant has not paid the said bill or any part thereof, &c.

Sixth plea: that, when the bill of exchange in the declaration mentioned was made, there was no such person as Carlos Raffo, the supposed payee, named in the said bill; but the said name of Carlos Raffo was and is merely fictitious, whereof the defendant at the time of his acceptance of the said bill had no notice or knowledge.

[1] 18 C. B. N. S. 694, S. C. — ED.

Demurrer to the above plea, and joinder in demurrer.

Hannen, in support of the demurrer. The question is, whether an acceptor for honor can set up as a defence that he did not know that the name of the payee was fictitious. It is submitted that he cannot, for he is in the same position as the drawer, who clearly could not have set up such a defence. In Byles on Bills, 73, 8th ed., it is stated that, "if the acceptor, at the time of acceptance, knew the payee to be a fictitious person, he shall not take advantage of his own wrong, but a *bona fide* holder may recover against him on the bill, and declare on it as payable to bearer, or may recover on the money counts;" and reference is made to the cases of Minet *v.* Gibson and Bennett *v.* Farnell. The reasoning applicable to an acceptor applies with even greater force to the drawer, and the case is not altered by the defendant having accepted for honor merely; for, if he be made to pay the bill, he has his remedy against the drawer. There is no case in the books exactly in point; but the liability of an acceptor *supra* protest is stated to be to all the parties on the bill subsequent to the person for whose honor it was drawn. (Story on Bills, § 123.) The defendant, therefore, stands in the position of the drawer; and, as the drawer could not have pleaded the present plea, the defendant, who has intervened in his behalf, is also estopped from pleading it.

Lush, Q. C. (*J. A. Russell* with him), *contra*. The defendant is not in the position of the drawer; for it is submitted that an acceptor *supra* protest, for honor of the drawer, stands really in the position of the drawee. In Story on Bills, § 262, it is stated that "acceptances, whether general, or for honor, or *supra* protest, after sight of the bill, admits the genuineness of the signature of the drawer. . . . But there is no such implied admission on the part of the acceptor of the genuineness of the signature of the payee, or of any other indorser." The question, therefore, is whether the acceptor in this case knew that the name of the payee was fictitious; and, as it appears that he did not, he cannot be held liable on his acceptance.

Hannen, in reply, referred to Robinson *v.* Yarrow.

ERLE, C. J. I am of opinion that our judgment should be for the plaintiff. The action is brought by the holders of a bill of exchange against the acceptor *supra* protest, for the honor of the drawer, acceptance having been refused when the bill arrived at maturity. All things seem to have been done to fix the defendant as acceptor *supra* protest, for honor of the drawer; but then the defendant relies on the bill being drawn, payable to a fictitious payee, of which he was ignorant when he accepted. It is clear law that the plaintiff could have recovered against the drawer himself, if the bill had been dishonored by the acceptor at maturity. If the action were brought by the holder against

the drawer, the latter would by law either be compelled to admit that the instrument was a valid bill payable to bearer, or he would be precluded from denying the indorsement of a fictitious payee. Such would have been the rights of the holder in this case, if the defendant had not intervened; and there is good reason for holding that, as the drawer could not have made this defence, and he would have been obliged to admit the signature of the payee, the party who accepted for honor of the drawer should also be estopped from denying the genuineness of the signature; that he should be bound, in fact, as much as the drawer to admit that it is not a forged bill. On payment of the bill by him, he has all the rights against the drawer that the holder would have had, if the defendant had not intervened. There is no authority against our decision, and the passage cited by Mr. Lush tends rather to its confirmation than otherwise.

BYLES and KEATING, JJ., concurred.

SMITH, J. The defendant having intervened for honor of the drawer, and for the purpose of his credit, has put himself in the same boat with him, and is estopped as much as the drawer from saying that this is not a valid negotiable instrument. Story, when he wrote the passage cited, had not, I think, this case in his mind. All that he says is that an acceptor for honor no more admits the signature of the payee than an ordinary acceptor; but an acceptor for honor of the drawer must for this purpose be considered as the drawer.

Judgment for the plaintiff.[1]

EWIN v. LANCASTER.

IN THE QUEEN'S BENCH, MAY 29, 1865.

[*Reported in 6 Best & Smith, 571.*]

DECLARATION by the plaintiff as indorsee of three bills of exchange payable three months after date, for £50, £100, and £50 respectively, drawn in 1863, by Burtwell on the defendant, accepted by the defendant, and indorsed by Burtwell to the plaintiff.

Plea: that the defendant accepted the bills for the accommodation of Burtwell, and that there was no consideration for such acceptance, whereof the plaintiff had notice.

Issue.

[1] See Phillips v. Im Thurn, L. R. 1 C. P. 463. — ED.

On the trial before Cockburn, C. J., at Guildhall, at the sittings after Hilary term, it appeared that after the bills became due there was an agreement between the plaintiff and Burtwell, the drawer, that, in consideration of his giving to the plaintiff a freehold mortgage for these bills and other debts, the plaintiff would deliver up the bills to be cancelled, and give up his claim on all parties. The mortgage security was given accordingly; but it contained no release of the acceptor, nor was his name mentioned in it.

The Lord Chief Justice left three questions to the jury:

First. Were the three acceptances accommodation acceptances?

Second. Was it known to the plaintiff at the time he took the mortgage security from Burtwell that they were accommodation acceptances?

Third. Was it agreed between the plaintiff and Burtwell that, on the mortgage security being given, the liability of the defendant should be discharged?

The jury answered the above questions in the affirmative, and the Lord Chief Justice directed the verdict to be entered for the plaintiff, with leave to move to enter the verdict for the defendant, power being reserved to the court to amend the plea, if necessary.

In Easter term,

Robinson, Serjt., obtained a rule *nisi* accordingly; against which

Montagu Chambers and *C. F. Day* showed cause. In Fentum *v.* Pocock, it was held that the inverted relation of principal and surety between the drawer and acceptor of an accommodation bill subsists only as between themselves. [CROMPTON, J. That case has been virtually overruled with reference to the equitable relation of the parties.] If, in pursuance of the power reserved to the court, it is to be considered that a plea on equitable grounds is put on the record, there remains the question whether it is sufficient that the plaintiff knew that the acceptances were accommodation acceptances subsequently to the time of taking them. In Fentum *v.* Pocock, Mansfield, C. J., said, p. 196, "One might find here a very important distinction between this case and the case decided by Lord Ellenborough, namely, that here the person taking the bill did not, at the time when he took it, know that it was an accommodation bill; and, if he did not then know it, what does it signify what came to his knowledge afterwards, if he took the bill for a valuable consideration?" In Harrison *v.* Courtauld,[1] it was held that the acceptor of an accommodation bill was liable to the indorsee, who had given a release to the assignees of the acceptor, who had become bankrupt, the indorsee having at that time, but not

[1] 3 B. & Ad. 36.

when he took the bill, knowledge that it was an accommodation acceptance. Strong *v.* Foster[1] and Pooley *v.* Harradine[2] were actions on promissory notes, and the circumstances were special. Here the plaintiff bought the bills of exchange with power to make any bargain with any party to the bills and without prejudice to his right against the acceptor, and he cannot be deprived of that right by notice subsequently given. The defendant was no party to the agreement made by the plaintiff with the drawer, and there is nothing to show that it was intended that it should be communicated to him.

Robinson, Serjt., and *R. E. Turner*, in support of the rule. Cook *v.* Lister is an authority that payment by the drawer of an accommodation bill, if the holder has notice of its being such when he receives it, is a complete discharge of the acceptor. In the present case, the third plea amounts to a plea of accord and satisfaction, which is equivalent to a plea of payment. The facts found by the jury show that the plaintiff waived his right of action against the surety. At all events, the giving of time to the drawer of the bills, with knowledge that they were accepted for his accommodation, is a defence upon equitable grounds for the acceptor. Bailey *v.* Edwards.[3]

Cockburn, C. J. The plaintiff is the holder of bills of exchange accepted by the defendant for the accommodation of Burtwell the drawer; and, after they became due he entered into an agreement with Burtwell, that, if Burtwell would give him a mortgage security on real estate, he, the holder, would cancel the bills and release all parties from liability upon them. That is the state of facts on the findings of the jury. The third plea is not made out to the full extent; but, in order that justice might be done, I reserved power to the court to amend it, if necessary; and, the court having power to add a plea, I think such a plea might be put on the record as would establish a defence on equitable grounds. In Bailey *v.* Edwards,[3] it was held that the giving time to a prior indorser of a bill of exchange discharged an accommodation acceptor; the principle on which that decision was founded being that the parties to an accommodation acceptance stand in relation of principal and surety. Where one is surety for another, and the creditor gives time to the principal debtor, the surety is discharged; for, if the surety pays the debt, he is entitled to sue the debtor in the name of the creditor, in order to recover back from him the money he has paid. In the present instance, if the accommodation acceptor had gone to the holder of the bills, and in order to get possession of them had proposed to him to pay them, with the view to

[1] 17 C. B. 201. [2] 7 E. & B. 431. [3] 4 B. & S. 761

enforce in the name of the creditor the liability of the drawer to repay him what he had so paid, the holder could not have given them up to him; for he had entered into an agreement to cancel them. And, as soon as he put it out of his power to deliver up the bills to the acceptor on payment of their amount, he deprived the accommodation acceptor of his right as surety to recover from the principal debtor. On that ground, as well as on the authority of Bailey v. Edwards,[1] I am of opinion that the plaintiff has discharged the surety, and therefore the rule should be made absolute.

CROMPTON, J. Originally, the cases at law were extremely strong that the position of parties to a bill of exchange or promissory note could not be reversed by making the party who appeared on the face of the instrument to be the principal debtor surety for the other. They proceeded on the principle that parol evidence is not allowed to alter a written contract: that principle is a sound one, and has governed many cases in courts of law. But cases in equity establish that when one or both of two parties to an instrument are primarily liable, as in the instance of a common bond where several join as obligors, and the creditor may sue any one of them at any time, it is competent for him to show that the relation of principal and surety exists between the parties. Lord Cottenham, in Hollier v. Eyre,[2] referred to in Pooley v. Harradine,[3] explained that the doctrine on which the courts of equity proceed arose from its being inequitable that the creditor should prejudice the rights of the surety against the principal. In Strong v. Foster,[4] which was after pleas on equitable grounds had been introduced, the evidence failed to support the equitable defence, and it was not necessary to pronounce an opinion on the validity of it. In Pooley v. Harradine,[5] this court upheld a plea on equitable grounds, which stated that the defendants made the note jointly with A. as surety only for him, of which the plaintiff had notice at the time, and that the plaintiff gave time to A. without the defendant's knowledge. That decision was adopted by the Court of Exchequer in Taylor v. Burgess,[6] and was held to be law by the Exchequer Chamber in Greenough v. McClelland.[7] But Pooley v. Harradine left one matter in doubt, viz., whether the creditor must have had notice of the suretyship at the time of taking the notes, or whether notice at the time of the dealing alleged to amount to a discharge of the surety was sufficient. That case came before this court in Bailey v. Edwards,[8] which

[1] 4 B. & S. 761.
[2] 9 Cl. & F. 1, 45.
[3] 7 E. & B. 431, 435.
[4] 17 C. B. 201.
[5] 7 E. & B. 431.
[6] 5 H. & N. 1.
[7] 2 E. & E. 424, 429.
[8] 4 B. & S. 761.

is very analogous to the present; and the law accurately laid down by my brother Blackburn in that case applies here. There the plaintiffs, when they executed the deed by which time was given, had notice that the bill was accepted for the accommodation of their debtor; and that is the time to be looked at, because it is the time when the equity arises. It is clear that a creditor is not bound to sue either the principal or the surety: no delay in suing the surety will prejudice him, but he must not make a binding agreement by which he ties up his hands from suing the principal; if he does so, the surety is discharged, on the principle explained by Williams, J., in Strong v. Foster.[1] Here the plaintiff made a contract with the principal upon good consideration to give up the bills to be cancelled. Whether that is a waiver of the right of action against the surety may be doubtful; for a waiver can only be to the party himself who relies upon it. But by that contract the plaintiff for a good consideration tied up his hands from suing the principal debtor. It may be shown by parol evidence that in the transaction between the creditor and his debtors, according to truth and for the purposes of equity, one of the debtors was surety for the other; and then the creditor is within the rule by which, if he gives time to the principal debtor, the surety is discharged.

SHEE, J., concurred. *Rule absolute.*[2]

[1] 17 C. B. 201, 219.

[2] Davies v. Stainbank, 6 DeG., M. & G. 679; Bailey v. Edwards, 4 B. & S. 761; Oriental Corporation v. Overend, L. R. 7 Ch. 142 (overruling *Ex parte* Graham, 5 DeG., M. & G. 356); Bristow v. Brown, 13 Ir. C. L. R. 201; Shelton v. Hurd, 7 R. I. 408, *accord*.

Similarly, where a principal and surety are joint and several makers of a note, and the holder, with knowledge of the suretyship, contracts to give time to the principal, it is held, in England, that the surety is discharged in equity. Manley v. Boycott, 2 E. & B. 46; Pooley v. Harradine, 7 E. & B. 431; Taylor v. Burgess, 5 H. & N. 1; Greenough v. McClelland, 2 E. & E. 424; Mutual Assoc. v. Sudlow, 5 C. B. N. S. 449; Lawrence v. Walmesley, 12 C. B. N. S. 799; Swire v. Redman, 1 Q. B. D. 536 (*semble*); Maingay v. Lewis, Ir. R. 5 C. L. 229.

But in the United States, notwithstanding the approval with which Fentum v. Pocock has been received, the surety is in such cases generally held to be discharged, even at law. Branch Bank v. James, 9 Ala. 949; Orvis v. Newell, 17 Conn. 97 (*semble*); Bull v. Allen, 19 Conn. 101 (*semble*); Perry v. Hodnett, 38 Ga. 103; Flynn v. Mudd, 27 Ill. 323; Kennedy v. Evans, 31 Ill. 258; Ward v. Stout, 32 Ill. 399; Dickerson v. Board of Commis., 6 Ind. 128; Kelly v. Gillespie, 12 Iowa, 55; Rose v. Williams, 5 Kas. 483; Champion v. Robertson, 4 Bush, 17; Jones v. Fleming, 15 La. An. 522; Mariners' Bank v. Abbott, 28 Me. 280; Lime Rock Bank v. Mallett, 34 Me. 547; 42 Me. 349, s. c.; Harris v. Brooks, 21 Pick. 195; Carpenter v. King, 9 Met. 511; Horne v. Bodwell, 5 Gray, 457; Jones v. Jeffries, 17 Mo. 577; Grafton Bank v. Kent, 4 N. H. 221; Wheat v. Kendall, 6 N. H. 504; Whitehouse v. Harrison, 42 N. H. 9; Holmes v. Dole, Clarke, Ch. 68 (*semble*); Hubbard v. Gurney, 64 N. Y. 457; Clippinger v. Creps, 2 Watts, 45; Wayne v. Kirby, 2 Bail. 551; Fowler v. Alexander, 1 Heisk. 425;

Wybrants v. Lutch, 24 Tex. 309; Austin v. Dorwin, 21 Vt. 38; Wilson v. Green, 20 Vt. 459; Peake v. Dorwin, 25 Vt. 28; Farmers' Bank v. Rathbone, 26 Vt. 19, 34; Riley v. Gregg, 16 Wis. 666.

See Yates v. Donaldson, 5 Md. 389, *contra*.

As was suggested by Mr. Justice Crompton in the principal case, the notion that an ostensible principal, although in fact a surety, would not be discharged at law by the holder's giving time to the real principal, has sometimes been supposed to be a consequence of the rule that a contract in writing cannot be varied by extrinsic evidence. To this view, however, there are two fatal objections: first, evidence showing the actual relation of principal and surety between parties liable upon the instrument does not vary the contract of either with the holder; secondly, if it did, inasmuch as the rules of evidence are the same on both sides of Westminster Hall, the surety would be as defenceless in equity as at law. Furthermore, this view is inconsistent with the well-settled doctrines of negotiable paper, that payment by the drawer of a bill accepted for his accommodation is an extinguishment of the bill, *supra*, Vol. I. p. 819, n. 2; Cook v. Lister, *supra*, Vol. I. p. 844; that an accommodation acceptor who has paid the bill may prove for the amount under the drawer's commission, *supra*, p. 5, n. 1; *supra*, Vol. I. p. 890, n. 1; and that a drawer without effects is not entitled to notice of dishonor, *infra*, p.

The true reason why the giving of time to the principal does not discharge the surety at law, it is submitted, is because a cause of action once accrued can be discharged only by a release, or an accord and satisfaction. For example, it is well settled, both in England and in the United States, that the surety on a bond is not discharged by indulgence granted to the principal obligor. Rees v. Berrington, 2 Ves. Jr. 542 (*semble*); Davey v. Prendergrass, 5 B. & Al. 187; Ashbee v. Pidduck, 1 M. & W. 564; Sprigg v. Mt. Pleasant Bank, 10 Pet. 257; U. S. v. Howell, 4 Wash. C. C. 620; Tate v. Wymond, 7 Blackf. 240; Lewis v. Harbin, 5 B. Mon. 564; Pintard v. Davis, Spencer, 205; Shaw v. McFarlane, 1 Ired. 216; Holt v. Bodey, 18 Pa. 207; Dozier v. Lee, 7 Humph. 520; Burke v. Cruger, 8 Tex. 66; Ward v. Johnson, 6 Munf. 6; Steptoe v. Harvey, 7 Leigh, 501.

But this rule, which of course does not prevail in equity, is not applicable to cases arising under the law-merchant upon bills of exchange. As was said by Lord Tenterden in Davey v. Prendergrass, *supra*: "Bills of exchange stand upon a very different footing: there the law-merchant operates, and the courts of law decide upon them with reference to that law." See also Locke v. U. S., 3 Mas. 446, 458, *per* Story, J. The truth of this proposition is evident from the fact that an indorser, whose liability has been fixed, is nevertheless discharged, if the holder gives time to any prior party to the bill. English v. Darley, *infra*, p. 118.

Accordingly, it would seem that the American cases cited in the third paragraph of this note were rightly decided, and that the ruling of Lord Ellenborough in Laxton v. Peat, *supra*, p. 4, notwithstanding the vigorous condemnation of that case expressed by Sir James Mansfield in Fentum v. Pocock, *supra*, p. 12, and by other judges in the cases cited in the note to the latter case, *supra*, p. 16, was nevertheless correct. — Ed.

SIMPSON v. GRIFFIN.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1812.

[*Reported in* 9 *Johnson*, 131.]

IN error on *certiorari*, from a justice's court.

Griffin sued Simpson before the justice, and declared for money had and received to his use, and for money lent. The defendant pleaded *non assumpsit*. The plaintiff proved that he had been sued as indorser of a note drawn by the defendant, and had been obliged to pay, besides the amount of the note, nineteen dollars, costs of suit. The taxed bill was produced to the justice, who gave judgment for the plaintiff for the amount.

Per Curiam. If the indorser of a note be duly fixed, he ought to pay it without waiting to be sued; but, if he finds it more convenient to delay taking up the note until he is prosecuted to judgment and execution, the drawer ought not to pay for that convenience. It is his own fault or misfortune that subjects him to costs, and he cannot resort to the drawer for indemnity against those costs. The mere fact of drawing the note does not imply a promise to save the payee harmless from all costs and charges that he may be subjected to, as indorser. There must be a special promise to save harmless, before the payee can call upon the drawer for costs accrued by the default of the payee himself. As payee, he can only look to the drawer for the amount of the note. The judgment must therefore be reversed.

Judgment reversed.[1]

ORY v. WINTER.

IN THE SUPREME COURT, LOUISIANA, MARCH, 1826.

[*Reported in* 4 *Martin, New Series*, 277.]

APPEAL from the court of the third district.

PORTER, J., delivered the opinion of the court.[2]

The action was instituted on a promissory note made at Natchez,

[1] Dawson v. Morgan, 9 B. & C. 618; King v. Phillips, Pet. C. C. 350; Barnwell v. Mitchell, 3 Conn. 101; Newman v. Goza, 2 La. An. 642; Fenn v. Dugdale, 81 Mo. 580; Buffalo v. Pipkin, 2 Jones (N. Ca.), 180; Richards v. Presnall, 1 McC. 192; Steele v. Sawyer, 2 McC. 459, *accord*.

An accommodation acceptor, against whom the holder has obtained judgment, cannot recover from the drawer the costs of the action against himself, unless he defended the action at the drawer's request. Roach v. Thompson, M. & M. 487; Beech v. Jones, 5 C. B. 696; Garrard v. Cottrell, 10 Q. B. 679; Crampton v. Walker, 30 L. J. Q. B. 19; 7 Jur. N. S. 43, S. C. The decision to the contrary in Jones v. Brooke, 4 Taunt. 464, although approved and followed in Stratton v. Matthews, 3 Ex. 48; Hubbly v. Brown, 16 Johns. 70; and Baker v. Martin, 3 Barb. 634, is not to be supported. See Mayne, Damages (2 ed.), 47. — ED.

[2] Only so much of the case is given as relates to the question of conflict of laws. — ED.

payable to one Lloyd Gilbert, and by him indorsed to the plaintiff and appellee.

It is shown by a statute of the State of Mississippi that the maker of a note in that State may set up any equitable defence against a *bona fide* indorsee, which he could offer against the payee. Laws of Mississippi, 464.

The first question in this cause is, By what laws should this contract be governed? The plaintiff contends that, as the note was indorsed in this State, and to a citizen of it, that the rights of the parties must be ascertained by the laws of Louisiana.

We are clearly of opinion it should not. That the validity of a contract must be ascertained in relation to the laws of the country where it is made is a rule as well known, and of as frequent application in this court as any other we act under. We see nothing in the circumstance of the rights of one of the parties being transferred to the citizen of another State, which can take the case out of the general principle. The argument which attempts to do so takes for granted the note was negotiable, in our understanding of the term, though the very object of the statute was to take from it that character. This is not the case of a citizen of one State claiming rights in opposition to those set up by a third party, under a contract made in pursuance to the laws of another country. It is a demand made under an agreement entered into in a foreign state, and consequently the party claiming rights under it must take it with all the limitations to which it was subject in the place where it was made, and that although he be one of our citizens.[1]

[1] Yeatman *v.* Cullen, 5 Blackf. 240 (*semble*); Newton *v.* Gray, 10 La. An. 67; Hull *v.* Blake, 13 Mass. 153; Dow *v.* Rowell, 12 N. H. 49 (*semble*); Wilson *v.* Lazier, 11 Grat. 477 (*semble*), *accord*.

Conf. Second Nat. Bank *v.* Hemingray, 5 Reporter, 404.

In Brabston *v.* Gibson, 9 How. 263; Kelly *v.* Shotwell, 1 Met. (Ky.) 313; Frazier *v.* Warfield, 17 Miss. 220; Miller *v.* Mayfield, 37 Miss. 688, it was stated extrajudicially that the right of the acceptor or maker to set up equitable defences against a holder for value without notice, was determined by the law of the place where the bill or note was payable.

In Stacy *v.* Baker, 2 Ill. 417; Murray *v.* Gibson, 2 La. An. 311; Harrison *v.* Edwards, 12 Vt. 648, on the other hand, opinions were expressed *obiter*, that the law of the place where the bill or note was accepted or made determined the acceptor's or maker's right to set up equitable defences. — Ed.

OSBORN v. MONCURE AND ROBINSON.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, AUGUST, 1829.

[*Reported in* 3 *Wendell*, 170.]

THIS was an action of assumpsit, tried at the New York Circuit, in June, 1828, before the Hon. Ogden Edwards, one of the circuit judges.

The suit was by the plaintiff, as payee against the defendants, as makers of a promissory note. On the third day of grace, payment was demanded at the compting house of the defendants, of a clerk therein (the defendants not being present), who said the note would not be paid. The defendants had stopped payment a few days before. The plaintiff had a *capias* issued, upon which the defendants were arrested previous to three o'clock P. M. of the third day of grace. The note having been proved, and these facts appearing, the defendants' counsel moved for a nonsuit, on the ground that the action was prematurely brought. The judge refused to grant the motion, and a verdict was rendered for the plaintiff. The defendants excepted to the opinion of the judge, and now moved to set aside the verdict.

D. P. Hall, for defendants. A promissory note payable to order, and negotiable by the statute, is entitled to days of grace (6 T. R. 123; 8 Cowen, 203); and a maker of such note which has not been negotiated, but remains in the hands of the original payee, has the whole of the last day of grace within which to make payment. 2 Cowen, 766, 736; 4 T. R. 148; Chitty on Bills, 365, 401, 420.[1]

R. M. Blatchford, for plaintiff. A demand having been regularly made and the note dishonored, the plaintiff had a right immediately to bring his suit. Such is considered the law in England. The contract of the maker of a note is to pay on demand on the appointed day; and, payment not being made on such demand, the contract is broken, and the holder may treat the note as dishonored. Chitty on Bills, 285. After the dishonor of a note, why should the holder wait until the next day to commence his suit? A notice to an indorser of demand and refusal on the third day of grace has been holden good. 1 Johns. Cas. 328. If an indorser may be sued on the third day of grace, why not the maker? In Massachusetts, an action was considered well brought against the maker on the third day of grace, after demand and refusal to pay. 1 Pickering, 401.

[1] A portion of the case relating to a question of procedure has been omitted. — ED.

Hall, in reply. The court in Massachusetts, in 2 Pickering, 123, retract much of what was said in 1 Pick. 401.

By the Court, Sutherland, J. The only question in this case is whether the suit was prematurely commenced. It is admitted that the writ was served before three o'clock P. M. of the third day of grace, payment having previously been regularly demanded, and refused; the defendants having failed some days before. It is not denied that the maker is entitled to the days of grace. 2 Cowen, 766; 8 Cowen, 205, and the cases there cited; Chitty on Bills, 420, 421.

Notice to the indorser on the third day of grace, after a demand upon the maker and his default of payment, is good, although it need not be given until the following day. It being earlier than is required, cannot form any objection on the part of the indorser. 1 Johns. C. 328; Chitty on Bills, 365; 3 Campb. 193. The demand upon the maker should be made on the third day of grace, and within a reasonable time before the expiration of the day (2 Caines, 344; 12 Johns. R. 424); and, if he then refuses payment, the holder has done all that is incumbent upon him to do, and may treat it as a dishonored bill, so far as immediately to give notice to the indorser; but still I apprehend the maker has the whole of the day to pay in, if he thinks proper to seek the holder. It is undoubtedly true, in relation to other contracts, that the party has until the last instant of the day to make payment; and I perceive no reason for making negotiable paper an exception to the general rule. 3 Bos. & Pul. 602; 4 T. R. 170; Chitty on Bills, 365, notes. Mr. Chitty seems to think the rule is differently settled. *New trial granted.*[1]

[1] McFarland v. Pico, 8 Cal. 626 (*semble*); Davis v. Eppinger, 18 Cal. 381; Smith v. Aylesworth, 40 Barb. 104; Coleman v. Carpenter, 9 Barr, 178 (*semble*), *accord*.

The principle of Osborn v. Moncure was affirmed also in the following cases, which are, however, clearly distinguishable, inasmuch as it does not appear that the notes were presented to the makers for payment before action brought. Wells v. Giles, 2 Gale, 209; Hinton v. Duff, 11 C. B. N. S. 724; Randolph v. Cook, 2 Port. 286; Wilcombe v. Dodge, 3 Cal. 260; Walter v. Kirk, 18 Cal. 381 (*semble*); Wiggle v. Thomason, 19 Miss. 452; Hopping v. Quin, 12 Wend. 517; Thomas v. Shoemaker, 6 W. & S. 179; Taylor v. Jacoby, 2 Barr, 495; Moore v. Hollamans, 25 Tex. Supp. 81; Cox v. Reinhardt, 41 Tex. 591 (*semble*). See also Startup v. MacDonald, 6 M. & G. 598, 602; Webb v. Fairmaner, 3 M. & W. 473, 474; Hartley v. Case, 1 C. & P. 555. — Ed.

WOODRUFF v. MOORE AND OTHERS.

IN THE SUPREME COURT, WASHINGTON SPECIAL TERM, FEBRUARY, 1850.

[*Reported in* 8 *Barbour*, 171.]

THIS cause was tried by the court, without a jury, by consent, at the Washington Circuit, on the 25th February, 1850. On the 13th April, 1843, Philander C. Moore & Co., the defendants, in the lifetime of Wm. P. Moore, made their certain promissory note in writing, of that date, by which they promised to pay to the order of the plaintiff, at the Bank of Whitehall, the sum of one thousand dollars, six months after date, with interest. The plaintiff transferred the note by indorsement, and it became the property of William A. Moore, who, three days before the Statute of Limitations attached, brought an action against the plaintiff alone as indorser. The plaintiff, having been regularly charged as indorser, was liable to pay the note, and in October, 1849, and a few days after the six years had elapsed from the time the note became due, paid the note to Mr. Moore and took it up; and he now brought a suit against the makers upon the note, and also charging them for money paid to their use. They interposed a plea of the Statute of Limitations, and the sole question was as to the validity of that defence.

C. F. Ingalls, for the defendants, insisted that, when an indorser pays and takes up a note, his remedy against the maker is upon the note alone. 6 Wend. 284; 7 D. & E. 568, 570; Chitty on Bills, 595.

J. W. Thompson, for the plaintiff, insisted that assumpsit for money paid by the indorser will lie against the maker, 2 Wend. 369; and that the Statute of Limitations commences running from such payment.

WILLARD, J. The contract between the maker of the note and the payee, or first indorsee, is that the former will pay the note according to its tenor and effect. The obligation is created by the instrument itself, and the remedy to enforce it will be discharged by the Statute of Limitations at the same moment, in whose hands soever the note may be. If the note had been held by the payee, for over six years, it cannot be doubted that the Statute of Limitations would be a valid plea on the part of the maker. The same would be the result, if the note had been held by any subsequent indorsee, however remote. If the payee, after having transferred the note, takes it up and becomes again the owner, he stands with reference to the maker in the same plight as if he had continued to hold it. His remedy is upon the note,

and, if over six years have elapsed since it became due, the remedy is gone, if the maker chooses to rely upon the statute. It cannot be said that the first indorser by taking up the note from his indorsee has merely paid money for the use of the maker. He has in fact only fulfilled his own contract, which was to pay the note in case the maker failed on demand to do so, and the requisite notice was given to him. If the note was at the time of such payment outlawed as to the maker, it cannot with any propriety be said that a payment by the payee to a subsequent party was a payment to the use of the maker, who in truth had ceased to be liable. See *per* Walworth, Ch., in Wright *v.* Butler.[1] A count for money paid to the use of another cannot be sustained, when the person for whose use it was alleged to have been paid had ceased to be liable, and had not requested it to be made. A contrary rule would deprive the maker of the benefit of the Statute of Limitations without his consent, and, indeed, of every other defence to the original demand.

The plaintiff cannot avoid the Statute of Limitations in this case, unless he can show that the liability of the defendant to the plaintiff was created by the payment by the latter, to William A. Moore, the indorsee of the note. But no implied promise to repay can be raised, when there is an express contract to which the party may resort, the consideration of which does not wholly fail. *Per* Lawrence, J., in Cowley *v.* Dunlop;[2] Chitty on Bills, 595. Promises in law only exist where there is no express stipulation between the parties. *Per* Buller, J., in Toussant *v.* Martainant.[3] If the party choose to take a security, there is no occasion for the law to raise a promise. The express contract in this case was the note upon which the defendant continued liable to the holder, whoever he might be, until the note became barred by the Statute of Limitation. There was no occasion, therefore, for the law to raise a promise. And the law never does a vain and useless thing.

The misfortune of the plaintiff is that he lay by too long before taking up the note. The loss of his remedy is imputable to his own laches. This case is distinguishable from Butler *v.* Wright.[4] In that case, there was no express contract subsisting between the parties that the defendant, the first indorser, would repay to the plaintiff, his indorsee, such sums as the latter should pay the holder, less than the whole amount becoming due. The liability was created by an implied promise raised by law, and the statute would commence running only from such payment. The action could not have been brought even on the contract of indorsement; for the reason that the plaintiff did not

[1] 6 Wend. 288.
[2] 2 D. & E. 105.
[3] 7 D. & E. 568.
[4] 20 John. 367; s. c. 2 Wend. 369.

own the note, not having paid the whole of it, and taken it up when the suit was commenced.

In the present case, the action is properly founded upon the note; and, under the code, it is presumed that the plaintiff could not recover without counting on the note. Under the former practice, the note would have been admissible in evidence under a count for money paid. Chitty on Bills, 595. But, under the code, the complaint must state the facts which constitute the cause of action. This, however, is a mere question of pleading. In both cases, the note would be treated as the cause of action.

I think, therefore, the defendant is entitled to judgment on the defence of the Statute of Limitations.

Judgment for the defendants.[1]

WOODS AND OTHERS *v.* RIDLEY AND OTHERS.

IN THE SUPREME COURT, TENNESSEE, DECEMBER TERM, 1850.

[*Reported in* 11 *Humphrey*, 194.]

THIS action was instituted in the Circuit Court of Davidson County. There was a judgment for the defendants on demurrer to the declaration; S. Anderson, Judge, presiding. The plaintiffs appealed.

H. M. Burton, for the plaintiffs.

Ready and *E. A. Keeble*, for defendants.

MCKINNEY, J., delivered the opinion of the court.

This is an action of debt brought by the plaintiffs as indorsees of Moses Ridley upon a bill single.

On the 1st of April, 1845, the defendants, Elizabeth Ridley, William A. Ridley, and James A. Ridley (together with S. J. Ridley, who is not sued), executed their note, under seal, for $8,560, payable three years after date, to the order of Moses Ridley, at the office of Messrs. Dick & Hill, in the city of New Orleans, with interest from date, at the rate of eight per cent per annum, for value received. Underneath the names of the above-named obligors, said Moses Ridley, the obligee, signed his name, without seal, as a joint maker of the note. Afterwards, said Moses Ridley indorsed said bill single to the plaintiffs, who thereupon brought this suit against the three obligors above-

[1] A note containing a citation of numerous authorities bearing upon the question decided in the principal case will be found in the appendix to this volume, p. 785. — ED.

named, jointly with Moses Ridley, the indorser; but, before declaration filed, a *nolle prosequi* was entered as to the latter.

The defendants demurred to the declaration, and the demurrer was sustained by the Circuit Court.

The demurrer presents the question whether the note is negotiable, or, in other words, whether the plaintiffs, as indorsees, can recover thereon; and we think it clear that they may.

By the Act of 1762, c. 9, § 2, promissory notes payable to any person or order are made negotiable in the same manner as inland bills of exchange, by the custom of merchants. And by the Act of 1786, c. 4, § 1: "All bills, bonds, or notes for money, as well those with seal as those without seal; those which are not expressed to be payable to order, or for value received, as those which are expressed to be payable to order, or for value received, shall be held and deemed to be negotiable, and all interest and property therein shall be transferable by indorsement, in the same manner, and under the same rules, regulations, and restrictions, as notes called promissory or negotiable notes have heretofore been."

By this statute, bills single are made negotiable in like manner as bills of exchange, by the law-merchant; or as promissory notes, by 3 & 4 Anne, c. 9, § 1, and our Act of 1762, c. 9, § 2.[1]

Another objection has been suggested, namely, that it is not averred that the note declared on in this case was negotiable by the law of Louisiana. This was not necessary. If the note were negotiated in this State, it is clear that, being negotiable by our law, a right of action would be vested in the plaintiffs, although it may not have been negotiable by the law of Louisiana. This is well settled upon the general doctrine of international law. Story on Conflict of Laws, § 353; Story on Prom. Notes, § 176, and authorities cited, note 1.

But, supposing the note to have been negotiated in Louisiana, and that by the law of that State it was not negotiable, still we incline to the opinion that, under our law, an action may be maintained by the indorsee against the makers. It has been held in England that, where a promissory note was made in England, payable to bearer, and was transferred in France, by whose law it was not negotiable, the French holder might maintain an action thereon in England, upon the provisions of the statute of Anne. Trimbey *v.* Vignier; Story on Prom. Notes, § 173, and notes.

How the law of Louisiana may be in respect to the negotiability of such paper as that sued on in the present case is a question of no

[1] A portion of the case has been omitted. — Ed.

practical consequence in the decision of the case in hand, as, upon the state of the case presented by the demurrer, it does not arise.

The judgment will be reversed.[1]

CALEB S. CARTER v. GEORGE W. SMITH.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1852.

[*Reported in* 9 *Cushing*, 321.]

THIS was an action of assumpsit upon a promissory note, dated "Portland, December 23, 1848," and signed by the defendant, of which the following is a copy: —

"For value received, I promise to pay C. S. Carter, agent of the Protection Insurance Company of New Jersey, or order, six hundred and one dollars, in fourteen months from date, at either of the banks in Portland, and such additional premium, if any, as may become due on policy No. 276."

On the back of the note was the following indorsement: "Paid $100, return premium."

At the trial in the Court of Common Pleas, the plaintiff produced no evidence of a demand upon the defendant at any bank in Portland to pay the note; nor did the defendant set up, or offer to prove, that he was ever present at any such bank with the money to pay the note. The defendant objected that the plaintiff must, in the first instance, prove such demand; but the presiding judge, Mellen, J., overruled this objection.

A verdict was rendered for the plaintiff, and the defendant excepted to the above ruling.

G. H. Kingsbury, for the defendant.

J. P. Bishop, for the plaintiff, cited Payson *v.* Whitcomb,[2] Carley *v.* Vance,[3] Ruggles *v.* Patten,[4] and claimed double costs, under Rev. Sts. c. 82, § 16.

SHAW, C. J. This is an action of *indebitatus assumpsit* upon a promissory note, made by the defendant to the plaintiff or his order, and payable at either of the banks in Portland, Maine.

In the Court of Common Pleas, no evidence was adduced of any

[1] In Freeman's Bank *v.* Ruckman, 16 Grat. 126, the negotiability of a note made in Massachusetts, and payable in Virginia, was thought to depend upon the law of Virginia. — ED.

[2] 15 Pick. 212. [3] 17 Mass. 389. [4] 8 Mass. 480.

demand upon the defendant at any bank, nor did the defendant offer to prove that he was ever present at any bank with the money to pay the note; but the defendant objected that such a demand must, in the first instance, be proved. The court overruled the objection; and, a verdict having been rendered for the plaintiff, the case comes before us upon exceptions to such ruling of the court.

Upon the question whether, in a suit upon a promissory note against the promisor, or upon a draft against the acceptor, a demand must be proved, there have been conflicting decisions in England, — the Court of King's Bench deciding one way, and the Court of Common Pleas, or the Exchequer, the other.

An act was finally passed to decide the question.[1]

It was early held here, in Ruggles v. Patten,[2] that a demand was not necessary. It has been so held in other States, and in the Supreme Court of the United States. Wallace v. McConnell.[3] Mr. Justice Story, in his work on Promissory Notes and Bills of Exchange, says he dissented from the opinion of the court in that case, but there is no note of his dissent preserved in the report.

The essence of the liability of the promisor is his indebtment to the holder of the note. The note is considered as an admission of debt, and that debt is not discharged merely by the omission to demand payment of it.

The want of a demand has its effect with regard to parties collaterally liable, like a drawer or indorser. To charge them, the holder must present his note to the acceptor or maker when it is due, and give them notice, if it is not paid. It is sufficient for this purpose, where the note or draft is payable at a bank, that it be presented there, and that the banker finds, upon examining his books, that he has no funds to pay it.

But it is contended that the presence of the promisor at the bank with his money is in the nature of a tender. This may be so, and the tender may be good, if proved; but, if the defendant means to rely on

[1] This statement of the English law as to the necessity of a demand in case of promissory notes, payable at a particular place, is entirely erroneous. The controversy between the King's Bench and the Common Pleas related exclusively to qualified acceptances. Both before and since Onslow's Act, it has always been necessary in England to allege and prove a demand in the case of promissory notes payable at a particular place. Roche v. Campbell, 3 Camp. 247; Trecothick v. Edwin, 1 Stark. 468; Emblin v. Dartnell, 12 M. & W. 830; Spindler v. Grellett, 1 Ex. 884; Sands v. Clark, 8 C. B. 751; Van der Donckt v. Thellusson, 8 C. B. 812. The ruling of Lord Ellenborough to the contrary, in Nicholls v. Bowes, 2 Camp. 498, is an isolated decision, and was in effect repudiated by himself in Roche v. Campbell and Trecothick v. Edwin, *supra*. — Ed.

[2] 8 Mass. 480. [3] 13 Peters, 136.

it, he must either plead it, or give due notice otherwise of such intention. If he pleads it, and that he has always been ready, and proves it, it may bar the costs, but, as in all cases of tender, he must also bring the money into court. This view is substantially confirmed by the case of Payson v. Whitcomb.[1] This would be the case, if the note were payable at a place certain. But this is payable at any bank in Portland. We do not know how many banks there may be in that city; but the expression, "either of the banks in Portland," indicates more than one.

Such a promise may impose a duty on the holder, under certain circumstances, to designate at what bank the note shall be paid; but it will be sufficient to decide that question when it shall arise.[2]

The exception is overruled, and judgment will be entered on the verdict; and, as the exceptions appear to us to be only intended for delay, the plaintiff is entitled to double costs.

Exceptions overruled.[3]

[1] 15 Pick. 462.

[2] The holder is under no duty to designate the bank. Jackson v. Pecker, 18 Conn. 342; Page v. Webster, 15 Me. 249; Langley v. Palmer, 30 Me. 467; Malden Bank v. Baldwin, 13 Gray, 154; Brickett v. Spaulding, 33 Vt. 107. — Ed.

[3] Wallace v. McConnell, 13 Pet. 136; Silver v. Henderson, 3 McL. 165; Irvine v. Withers, 1 Stew. 284 (*semble*); Evans v. Gordon, 8 Port. 142; Montgomery v. Elliott, 6 Ala. 701 (*semble*); Sumner v. Ford, 3 Ark. 389; McKiel v. Real Estate Bank, 4 Ark. 592; Montgomery v. Tutt, 11 Cal. 307 (overruling Wild v. Van Valkenburgh, 7 Cal. 166); Eldred v. Hawes, 4 Conn. 465; Bond v. Storrs, 13 Conn. 412; Allen v. Miles, 4 Harringt. 284; Martin v. Delaplaine, 5 Harringt. 329; Dougherty v. Western Bank, 13 Ga. 287; Butterfield v. Kinzie, 2 Ill. 445; Armstrong v. Caldwell, 2 Ill. 546; New Hope Co. v. Perry, 11 Ill. 467; Yeaton v. Berney, 62 Ill. 61; McCullough v. Cook, 34 Ind. 290; Hill v. Allen, 37 Ind. 541 (overruling Palmer v. Hughes, 1 Blackf. 328, and Gilby v. Springer, 1 Blackf. 257); Bank of Ky. v. Hickey, 4 Litt. 225; Funes y Carillo v. U. S. Bank, 10 Rob. (La.) 533; Ripka v. Pope, 5 La. An. 61 (overruling Mellon v. Croghan, 15 Mart. 423); Wood v. Mullen, 3 Rob. (La.) 395; Warren v. Allnutt, 12 La. 454; and Moss v. Byrnes, 12 La. 615); Calop v. Fluker, 12 La. An. 551; Stokes v. Forman, 12 La. An. 671; Catalogne v. Alva, 13 La. An. 98; Thiel v. Conrad, 21 La. An. 214; Bacon v. Dyer, 12 Me. 19; Remick v. O'Kyle, 12 Me. 340; Bowie v. Duvall, 1 Gill & J. 181; Ruggles v. Patten, 8 Mass. 480; Carley v. Vance, 17 Mass. 389; Payson v. Whitcomb, 15 Pick. 212; Malden Bank v. Baldwin, 13 Gray, 154; Reeve v. Pack, 6 Mich. 240; Balme v. Wambaugh, 16 Minn. 116; Washington Bank v. Planters' Bank, 2 Miss. 230; Eastman v. Fifield, 3 N. H. 333; Otis v. Barton, 10 N. H. 433; Weed v. Van Houten, 4 Halst. 189; Caldwell v. Cassidy, 8 Cow. 271; Hills v. Place, 48 N. Y. 520; Nichols v. Pool, 2 Jones (N. Ca.) 23; Conn v. Gano, 1 Oh. 224; Fitler v. Beckly, 2 W. & S. 458; Middleton v. Boston Works, 26 Pa. 257; N. Pa. Co. v. Adams, 54 Pa. 94; Smith v. Burrell, 3 Rich. 314, cited; McNairy v. Bell, 1 Yerg. 502; Mulherrin v. Hannum, 2 Yerg. 81; Edwards v. Hasbrook, 2 Tex. 578; Bart v. Green, 8 Vt. 191; Watkins v. Crouch, 5 Leigh, 522 (*semble*); Armistead v. Armistead, 10 Leigh, 512; Howard v. Borrman, 17 Wis. 459, *accord*. — Ed.

VEAZIE BANK v. WINN.

SAME v. SAME.

IN THE SUPREME JUDICIAL COURT, MAINE, 1855.

[*Reported in* 40 *Maine Reports*, 62.]

ASSUMPSIT. These suits were against the makers of promissory notes, dated at Bangor, Sept. 18, 1854.

One of the notes read thus: —

"Two months after date, value received, I promise to pay E. Paulk, or order, four thousand dollars at the Veazie Bank."

The other, thus: —

"Two months after date, value received, I promise to pay D. F. Leavett, or order, twenty-one hundred dollars, at either bank in Boston."

The general issue was pleaded.

The payees indorsed the notes, and they were discounted by plaintiffs.

These suits were commenced on Nov. 21, 1854.

After the notes and indorsements were read to the jury, the causes were withdrawn by consent, and submitted to the decision of the full court upon the evidence, the writs making a part of the case, to render judgment by nonsuit or default, according to the legal rights of the parties. Some evidence was introduced by defendant, which had no bearing on the ground of the decision.

Peters, for defendant, argued that these actions were premature, there being no evidence of a previous demand, and no evidence at what time of the day the writs were made; and cited Greeley v. Thurston,[1] Flint v. Rogers,[2] Staples v. Franklin Bank.[3]

A. Lyon and *E. Kent*, for plaintiffs.

TENNEY, J. A suit may be properly brought against the maker upon a negotiable promissory note on the last day of grace, after the demand of payment made at a reasonable hour of that day, and a refusal.[4] And,

[1] 4 Greenl. 479. [2] 15 Me. 67. [3] 1 Met. 43.

[4] Lunt v. Adams, 17 Me. 280; Ammidown v. Woodman, 31 Me. 580; Vandesande v. Chapman, 48 Me. 262; Church v. Clark, 21 Pick. 310; Staples v. Franklin Bank, 1 Met. 43; Wilson v. Williman, 1 N. & McC. 440; McKenzie v. Durant, 9 Rich. 61; Coleman v. Ewing, 4 Humph. 241.

In Lefflen v. Mills, 4 T. R. 170, Buller, J., said (p. 474): "I cannot refrain from expressing my dissent to what has fallen from my lord respecting the time when the payment of bills of exchange may be enforced. The rule as to the time of paying rent, or any of the other cases mentioned by my lord, cannot, I think, apply to this case. But one of the plaintiff's counsel has correctly stated the nature of the accept

if a note is payable at a bank, a suit may be properly commenced on the last day of grace, after banking hours, without demand and notice. But it seems to be regarded as settled in this State and in Massachusetts, and also in other States, upon what is considered the weight of authority in England, that an action cannot be maintained, if brought on the last day of grace, unless previously demanded on that day, or unless made payable at the bank on that day. Greeley v. Thurston,[1] Staples v. Franklin Bank.[2]

These suits were instituted upon promissory notes, which were in the bank on the last day of grace; and the cases furnish no evidence of a previous demand, or that they were commenced after the expiration of business hours at the bank, consequently they were premature.

Plaintiff's nonsuit.[3]

or's undertaking, which is, to pay the bill *on demand on any part of the third day of grace;* and that rule is now so well established that it will be extremely dangerous to depart from it. With regard to foreign bills of exchange, all the books agree that the protest must be made on the last day of grace. Now, that supposes a default in payment, for a protest cannot exist, unless default be made. But, if the party has till the last moment of the day to pay the bill, the protest cannot be made on that day. Therefore, the usage on bills of exchange is established: they are payable any time on the last day of grace on demand, provided that demand be made within reasonable hours. A demand at a very early hour of the day — at two or three o'clock in the morning — would be at an unreasonable hour; but, on the other hand, to say that the demand should be postponed till midnight would be to establish a rule attended with mischievous consequences. If this case were to be governed by any analogy to the demand of rent, payment of a bill of exchange could not be demanded till sunset; and, if so, the situation of bankers would be extremely hazardous; for they would then be obliged to send out their clerks at night with bills to a very considerable amount, all of which must be presented within a short space of time, though to houses in different parts of the town."

In Staples v. Franklin Bank, *supra*, Shaw, C. J., said (p. 56): "On the whole, we think the weight of authority is in favor of the conclusion to which we have come; and, if it were now a new question, it seems to follow, on legal principles, as a fair and legitimate conclusion from the established fact that the contract of the acceptor or maker is broken by a neglect or refusal to pay on demand, within reasonable time, on the last day of grace, that the holder may then have his remedy by action."

The refusal of an acceptor to pay a bill in the morning of the day of maturity is an act of bankruptcy, notwithstanding a subsequent payment of the bill on the same day. Colkett v. Freeman, 2 T. R. 59. — Ed.

[1] 4 Greenl. 479.

[2] 1 Met. 43.

[3] Greeley v. Thurston, 4 Greenl. 479; Gordon v. Parmelee, 15 Gray, 413; Estes v. Tower, 102 Mass. 65, *accord*.

See *supra*, p. 87, n. 1. — Ed.

R. W. WOODRUFF AND OTHERS *v.* J. F. HILL AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER 11, 28, 1874.

[*Reported in* 116 *Massachusetts Reports*, 310.]

CONTRACT upon a promissory note for $1,352.70. At the trial in the Superior Court, before Putnam, J., the plaintiffs offered evidence tending to prove that the defendants made the note, and that the payees indorsed it before maturity to the plaintiffs, who paid to the payees at the time of the indorsement, and as the consideration therefor, $699.48 in cash, and credited the payees with $629.55, in payment of a pre-existing debt due from them to the plaintiffs, the balance of said note amounting to $23.67, being charged and allowed for interest. The payees of the note and the plaintiffs are residents of New York, and the indorsement was made in that State. The defendants are residents of Boston, in this Commonwealth; and the note was made and was payable in Boston.

The defendants offered to prove that by the law of New York the plaintiffs, upon the above evidence, were not *bona fide* holders for value except as to the amount of the money paid by them to the payees at the time of the indorsement; that the note was given by them without consideration to the payees, they agreeing not to use the same except as collateral to their own note, to raise money upon; and that, as between them and the payees, the transfer of the note to the plaintiffs was fraudulent. The defendants did not contend that the plaintiffs had any knowledge of the want of consideration of the note, or of the purpose for which it was given.

The judge ruled that the facts offered by the defendants would not, if proved, constitute a defence, and that the law of this Commonwealth and not the law of New York governed, and instructed the jury to return a verdict for the plaintiffs for the whole amount of the note. The defendants alleged exceptions.

A. A. Ranney, for the defendants.

H. J. Boardman and *C. Blodgett*, for the plaintiffs.

GRAY, C. J. The note was made in Massachusetts, and the contract of the makers with the payees and with any indorsee thereof was to be performed here, and governed by our law. Story, Confl. Laws, §§ 317, 344, 345. By that law, the facts offered to be proved at the trial constituted no defence. Blanchard *v.* Stevens.[1] *Exceptions overruled.*

[1] 8 Cush. 162.

NORMAN v. NORMAN.

IN THE SUPREME COURT, INDIANA, DECEMBER 8, 1858.

[*Reported in* 11 *Indiana Reports*, 288.]

APPEAL from the Wayne Court of Common Pleas.

DAVISON, J. — Phœbe Norman, on the 12th of July, 1855, filed in the clerk's office of the Common Pleas the following: —

"Estate of Mallory Norman, deceased, to Phœbe Norman, Dr.

"To amount of note and receipt, copies of which read thus:

"January 1, 1852. Two years after date, I promise to pay Phœbe Norman $500, without interest, for value received. [Signed] Mallory Norman."

"March 17, 1851. Received of Phœbe Norman $303, without interest, on William Norman's estate, for value received. [Signed] Mallory Norman."

At the April term, 1856, said administratrix appeared and answered,[1] That on the 30th of November, 1842, one William Norman made his last will and testament, a copy of which is filed with the answer, whereby he gave his property therein mentioned to said Phœbe Norman, his wife, for and during the period of her natural life, with remainder over to his heirs, naming them, one of whom was the said Mallory Norman, the son of said William and Phœbe. Defendant avers that, upon William Norman's death, she, Phœbe, took possession of all the property bequeathed by said will, and, during the life of Mallory Norman, paid him the moneys set forth in the complaint, as an advancement on his interest in said estate, and took the note and receipt therein described to show the amount he had received on that interest, with no intention of ever calling on him to refund the same, or any part thereof, but with the understanding and agreement that the same should be an advancement, as before stated. Wherefore, defendant says that the estate of Mallory Norman does not owe the sums sued for, &c. To this defence there was no reply. Verdict for the defendant.

Motions for a new trial, and in arrest denied, and judgment rendered on the verdict.

The appellant insists that the defence is not effective, because it sets up a verbal, contemporaneous agreement, varying the terms of the note and receipt. There are various decisions to the effect that such an agreement is a nullity; but the decisions thus made are applied to cases in which the verbal contemporaneous agreement relates to instruments conceded to be on a valid consideration, and operative. But here, the defence is that the note and receipt were not originally

[1] Only so much of the case is given as relates to this answer. — ED.

intended to be enforced; that they were given merely to show the amount which had been advanced to Mallory Norman, on his interest under the will of William Norman, deceased. Prior to the rules of pleading now in force, the case made by the defendant below would have entitled her, in equity, to a cancellation of the instruments in suit. Sherman v. Sherman,[1] and cases there cited. And the result seems to be — there being now no distinct court of equity — that the matter stated in the answer is well pleaded as an equitable defence to the action. Van Santv. Pl. 505, *et seq.* In our opinion, — there being no reply — the answer must be taken as true. It is an available defence. The judgment must be affirmed.

Per Curiam. The judgment is affirmed with costs.[2]

STEWART v. ANDERSON.

IN THE SUPREME COURT, INDIANA, NOVEMBER TERM, 1877.

[*Reported in* 59 *Indiana Reports*, 375.]

FROM the Shelby Circuit Court.

PERKINS, J. Suit by Anderson, the payee, against Stewart, the maker, upon a promissory note.

Answer in three paragraphs:

1. That the note was delivered to the agent of the payee as an escrow, and its absolute delivery had never been authorized.[3]

A demurrer was sustained to this paragraph.

As to the ruling upon the demurrer, it may be observed, it is a general rule of law that a written instrument cannot be delivered to the payee or his agent as an escrow.[4] Madison Co. v. Stevens,[5] Deardorff v. Foresman,[6] Roche v. Roanoke Seminary.[7]

Judgment affirmed.

[1] 8 Ind. R. 337.

[2] Ayer v. Duncan, 50 Cal. 327 (*semble*); Peabody v. Peabody, 59 Ind. 556; Hardin v. Wright, 32 Mo. 452; Seymour v. Cowing, 4 Abb. App. 300; 1 Keyes, 582, s. c.; Morris v. Faurot, 21 Oh. St. 155; Hamburger v. Miller, 48 Md. 317 (*indorsement*); Powers v. French, 1 Hun, 582 (*indorsement*); Davis v. Morgan, 64 N. Ca. 570 (*indorsement*); *accord.*

Shaw v. Shaw, 50 Me. 94; Billings v. Billings, 10 Cush. 178 (But see Watkins v. Bowers, 119 Mass. 388, *contra.*

[3] Only so much of the case as relates to this paragraph is given. — ED.

[4] Scott v. State Bank, 9 Ark. 36; Badcock v. Stedman, 1 Root, 87; Walker v. Crawford, 56 Ill. 444, 449 (*semble*); Massman v. Holscher, 49 Mo. 87; Henshaw v. Dutton, 59 Mo. 139; Jones v. Shaw, 67 Mo. 667, *accord.*

See also Towers v. Richardson, 6 Ala. 351.

Miller v. Gambie, 4 Barb. 146; Seymour v. Cowing, 4 Abb. App. 200; 1 Keyes, 582 s. c.; Benton v. Martin, 52 N. Y. 570; Sweet v. Stevens, 7 R. I. 375, *contra.*

See also Simonton v. Steele, 1 Ala. 357.

[5] 10 Ind. 1. [6] 24 Ind. 481. [7] 56 Ind. 198.

SECTION II.

Drawer and Indorser.

DUCKMANEE v. KECKWITH.

IN THE KING'S BENCH, MICHAELMAS TERM, 1691

[*Reported in Comberbach*, 176.]

A BILL of exchange is drawn, payable to J. S. (not saying *or order*). J. S. assigns this bill by indorsement, and the action is brought against J. S.

HOLT, C. J. If this be a bill which is assignable, then clearly the action lieth; but here the question is whether this will amount to a new bill to charge the indorser. I agree, if it were payable to J. S. or order, then it is assignable; and you may have your action against the indorser, or resort to the first drawer.[1]

[1] "Now, exception was taken that one bill was payable to the defendant only, without the words *or his order*, and, therefore, not assignable by the indorsement; and the Chief Justice did agree that the indorsement of that bill did not make him that drew the bill chargeable to the indorsee; for the words, *or to his order*, give authority to the plaintiff [defendant?] to assign it by indorsement, and it is an agreement by the first drawer that he would answer it to the assignee; but the indorsement of a bill which has not the words *or to his order* is good, or of the same effect betwixt the indorser and the indorsee, to make the indorser chargeable to the indorsee." *Per* Holt, C. J., in Hill *v.* Lewis, 1 Salk. 132; and see, to the same effect, Plimley *v.* Westley, 2 B. N. C. 249; Helfer *v.* Alden, 3 Minn. 332 (*semble*); White *v.* Low, 7 Barb. 204; Parker *v.* Riddle, 11 Oh. 102 (*semble*); Leidy *v.* Tammany, 9 Watts, 353; Brenzer *v.* Wightman, 7 W. & S. 264; Aldis *v.* Johnson, 1 Vt. 136; Carruth *v.* Walker, 8 Wis. 252. Conf. Bircleback *v.* Wilkins, 22 Pa. 26; Raymond *v.* Middleton, 29 Pa. 529.

In Long *v.* Smyser, 3 Iowa, 266; Wilson *v.* Ralph, 3 Iowa, 450; Hall *v.* Monohan, 6 Iowa, 216; Billingham *v.* Bryan, 10 Iowa, 317; Josselyn *v.* Ames, 3 Mass. 274; Sweetser *v.* French, 2 Cush. 309; Wareham Bank *v.* Lincoln, 3 All. 192; Seymour *v.* Van Slyck, 3 Wend. 403 (*semble*); Cromwell *v.* Hewitt, 40 N. Y. 491; Newman *v.* Frost, 52 N. Y. 422 (*semble*); Leidy *v.* Tammany, 9 Watts, 353 (*semble*), the indorser of note which contained no words of negotiability was declared to assume the liability of a maker of a new note. In Prentiss *v.* Danielson, 5 Conn. 175; Perkins *v.* Catlin, 11 Conn. 218 (*semble*), a similar indorser was held liable as a guarantor of the collectibility of the note; and in Wilson *v.* Mullen, 3 McC. 236 (*semble*); Benton *v.* Gibson, 1 Hill (S. Ca.), 56, a similar indorser was held to assume no liability whatever. — ED.

WILLIAMS *v.* WILLIAMS.

In the Exchequer Chamber, Easter Term, 1698.

[*Reported in Carthew*, 269.]

The plaintiff, Thomas Williams, being a goldsmith in Lombard Street, brought an action on the case against Joseph Williams, the projector of the diving engine, and declared upon a note drawn by one John Pullin, by which he promised to pay £12 10*s.* unto the said Joseph Williams on a day certain; and he indorsed the note for value received unto one Daniel Foe, who indorsed it to the plaintiff for like value received.

And now the plaintiff, as second indorsee, declared in this manner, ss. that the city of London is an ancient city, Quodq. habetur et a tempore cujus contrarium memoria hominum non existit habebatur quædam antiqua et laudabilis consuetudo inter mercatores et al. personas commercium exercen, infra hoc regnum Angliæ residen. usitat. et approbat., videl't, &c.

So sets forth the custom of merchants concerning notes so drawn and indorsed *ut supra*, by which the first indorser is made liable as well as the second, upon failure of the drawer, and then sets forth the fact thus:—

ss. Cumque etiam quidam Joh'es Pullin existen. persona quæ per viam merchandisand. commercium habuit, &c. (on such a day) apud London. prædict. videl't, in parochia beatæ Mariæ de Arcubus in Warda de Cheap. secundum usum et consuetud. mercatorum quandam Billam sive notam in scriptis nomine suo subscript. fecit geren. dat., &c. Et per eandem Billam sive notam promisit solvere, &c., setting forth the note; and, farther, that it was indorsed by the defendant to Foe, and by Foe to the plaintiff, secundum usum et consuetudin. mercatorum; and that the drawer, having notice thereof, refused to pay the money per quod the defendant, secundum usum et consuetud. mercatorum, became liable to the plaintiff, and in consideration thereof promised to pay it, &c., alleging that they were all persons who traded by way of merchandise, &c.

To this the defendant pleaded a frivolous plea, and the plaintiff demurred, and upon the first opening of the matter had judgment in B. R., and now the defendant brought a writ of error in the Exchequer Chamber; and the only error insisted on was that the plaintiff had not declared on the custom of merchants in London, or any other particular place (as the usual way is), but had declared on a custom through all England, and, if so, it is the common law, and then it ought

not to be set out by way of custom; and, if it is a custom, then it ought to be laid in some particular place from whence a venue might arise to try it.

To which it was answered that this custom of merchants concerning bills of exchange is part of the common law, of which the judges will take notice *ex officio*, as it was resolved in the case of Carter and Dowrish; and therefore it is needless to set forth the custom specially in the declaration, for it is sufficient to say that such a person, secundum usum et consuetudinem mercatorum, drew the bill: therefore, all the matter in the declaration concerning the special custom was merely surplusage, and the declaration good without it.

The judgment was affirmed.[1]

THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND *v.* NEWMAN.

In the King's Bench, May 3, 1699.

[*Reported in Lord Raymond*, 442.]

Bellamy signed a bill payable to Newman or bearer. Newman came to the Bank of England, and asked how much money they would give him for this bill. They took the bill, and gave him so much money, allowing so much for discount. After that, the bank received £10,000 of Bellamy; and afterwards they send a man to demand the money due upon this bill of Bellamy; and a demand was made of Bellamy's servant, who did not pay the money. And afterwards Bellamy fails, and the bank sue Newman for the money which he had received of them for this bill, as for so much money lent by them. And upon the general issue pleaded, it being tried before Holt, C. J., in London, the sitting after the last term, the verdict was for the plaintiff, against his opinion. And now a new trial was granted, because this was a plain sale of the bill. For, *per* Holt, C. J., if a man has a bill payable to him or bearer, and he delivers it over for money received, without indorsement of it, this is a plain sale of the bill, and he who sells it does not become a new security;[2] but, if he

[1] Dunlop *v.* Silver, 1 Cranch, App. 367; Dunn *v.* Adams, 1 Ala. 527; Irvin *v.* Maury, 1 Mo. 194, *accord.*

Mandeville *v.* Riddle, 1 Cranch, 290; 5 Cranch, 322; Harris *v.* Johnston, 3 Cranch, 311; Dunlop *v.* Harris, 5 Call, 16, *contra.*

See Bullitt *v.* Scribner, 1 Blackf. 14. — Ed.

[2] Fydell *v.* Clark, 1 Esp. 447; Fenn *v.* Harrison, 3 T. R. 757; Emly *v.* Lye, 15 East, 7 (*semble*); *Ex parte* Shuttleworth, 3 Ves. Jr. 368; Evans *v.* Whyle, 5 Bing.

had indorsed it, he had become a new security, and then he had been liable upon the indorsement.[1] But upon a new trial the jury found for the plaintiffs.

LAMBERT v. OAKES.

In the King's Bench, Easter Term, 1700.

[*Reported in* 1 *Lord Raymond*, 443.]

R. signed a note under his hand, payable to Oakes or his order; Oakes indorsed it to Lambert; upon which Lambert brought the action for the money against Oakes. *Per* Holt, C. J., he ought to prove that he had demanded, or done his endeavor to demand, this money of R. before he can sue Oakes upon the indorsement.[2] The same law, if the bill was drawn upon any other person, payable to Oakes or order. And the demand to entitle Lambert to his action must be after the indorsement. 2. Oakes had indorsed this blank bill to Lambert, viz., by the writing of his name only, upon discount; and, therefore, it was urged by Mr. Northey that this was a plain sale of the bill, and the indorsement shall not subject the indorser to an action, because the bill cannot be sold, to entitle the vendee to take the benefit of it, without indorsement; and the practice among merchants is so. But Holt, *e contra:* for their practice cannot alter the

485; Corbit *v.* Bank of Smyrna, 2 Harringt. 235; Burgess *v.* Chapin, 5 R. I. 225; Barton *v.* Trent, 3 Head, 167 (*semble*); Edmunds *v.* Digges, 1 Grat. 359, *accord.*

So, if the holder of a bill under a blank indorsement writes above the signature of the indorser in blank, "Pay to A.," and then delivers the bill to A., he does not thereby become liable to A. as an indorser. Vincent *v.* Horlock, 1 Camp. 442; *Ex parte* Isbester, 1 Rose, 20. See Bland *v.* Ryan, Peake, Add. 39. — Ed.

[1] Hill *v.* Lewis, Skin. 410; 1 Salk. 132; Cox *v.* Adams, 2 Ga. 168; Tillman *v.* Ailles, 13 Miss. 378; Brush *v.* Reeves, 3 Johns. 489; Dean *v.* Hall, 17 Wend. 213; Seabury *v.* Hungerford, 2 Hill, 80; Eccles *v.* Ballard, 2 McC. 388; Allwood *v.* Haseldon, 2 Bail. 457; Pride *v.* Berkeley, 5 Rich. 587; Davis *v.* Wilson, 31 Tex. 136, *accord.*

Nelson *v.* Dubois, 13 Johns. 175 (overruled); Frampton *v.* Dudley, 1 N. & McC. 29; Tuten *v.* Ryan, 1 Speer, 240, *contra.* — Ed.

[2] Darrach *v.* Savage, 1 Show. 155; Rushton *v.* Aspinall, 2 Doug. 679; Bridges *v.* Berry, 3 Taunt. 130; Alexandria Bank *v.* Young, 2 Cranch, C. C. 52; Gracie *v.* Sandford, 9 Ark. 238; Dwight *v.* Scovil, 2 Conn. 654; Beckwith *v.* Carleton, 14 Ga. 691; Red Oak Bank *v.* Orvis, 40 Iowa, 332; Union Co. *v.* Rodd, 26 La. An. 715; Long *v.* Stephenson, 72 N. Ca. 569, *accord.*

The guarantor of a note is liable if the note is not paid at maturity, even though it has not been presented to the maker for payment. Walton *v.* Mascall, 13 M & W 452; Gage *v.* Mech. Bank, 79 Ill. 62. — Ed.

law; and the indorsement, though upon discount, will subject the indorser to an action, because it is a conditional warranty of the bill, and makes a new contract, in case the person upon whom it was drawn does not pay it. 3. *Per* Holt, C. J.: If A. indorses a bill blank to B., he thereby put it in the power of B. to overwrite what B. pleases. 4. If the indorsee does not demand the money payable by the bill of the person upon whom it is drawn in convenient time, and afterwards he fails, the indorser is not liable. 5. If the action be brought against the indorser, it is not necessary to prove the hand of the drawer; for, though it be forged, the indorser is liable.[1]

HEYLYN AND OTHERS v. ADAMSON.

IN THE KING'S BENCH, NOVEMBER 20, 1758.

[*Reported in* 2 *Burrow*, 669.]

THIS was an action on the case upon promises. And the first count in the declaration was upon an inland bill of exchange, drawn by Robert Carrick and directed to William Dods, dated the 13th day of March, 1756; whereby the said Robert Carrick required the said William Dods to pay to the defendant, or his order, £100, at forty days after date, value received, as advised by the said Robert Carrick: which said bill was indorsed by the said defendant (Eleanor Adamson) to the said plaintiffs, and was accepted by the said Dods, but not paid by him.

Upon the trial of this cause before Lord Mansfield, at the sittings after the last Hilary term at Guildhall, it was proved on the part of the plaintiffs that said Robert Carrick made the bill; and that the defendant indorsed it to the plaintiffs, and that the said William Dods accepted it, but afterwards refused payment; and that the plaintiffs thereupon, on the day it became payable, carried it to be protested for the non-payment, and soon afterwards brought their action thereon against the defendant; but it did not appear on the trial that the drawer of the bill had any notice of such non-payment, or that any demand of the money was ever made on him before the commencement of the suit.

It was thereupon objected by the defendant's counsel, "that the action would not lie against the defendant (the indorser), until a demand of payment had been made upon the drawer;" and, as no such

[1] Williams v. Scayran, 2 Barnard. 82, *accord*. — ED.

demand was proved to have been made on the drawer, the plaintiffs ought therefore to be nonsuited.

LORD MANSFIELD directed a verdict to be given upon the said first count, for the plaintiffs, for £100 damages and 40*s*. costs, subject to the opinion of the court, "whether, upon this case, the plaintiffs were entitled to recover."

A case was accordingly stated for the opinion of the court, and signed by Sir Richard Lloyd for the plaintiffs, and by Mr. Norton for the defendant.

The only question was whether, in an action brought upon an inland bill of exchange, by the indorsee against an indorser, this objection, "that no evidence was given at the trial of notice to the drawer of the bill, or even of making any inquiry after him," was a ground of nonsuit.

It was argued on Tuesday last (the 14th instant), by Mr. Serjeant *Davey* for the plaintiff, and Mr. *Rooke* for the defendant.[1]

LORD MANSFIELD now delivered the resolution of the court.

His lordship said, he could not persuade himself that there had really been such a variety of opinions upon this question at Nisi Prius, as had been mentioned at the bar. But, however that may be, it must now be determined upon the nature of the transaction, general convenience, and the authority of deliberate resolutions in court.

A bill of exchange is an order or command to the drawee who has, or is supposed to have, effects of the drawer in his hands to pay. When the drawee has accepted, he is the original debtor; and due diligence must be used in applying to him. The drawer is only liable in default of payment by him, due diligence having been used; and, therefore, if the acceptor is not called upon within a reasonable time after the bill is payable, and happens to break, the drawer is not liable at all.

Every man, therefore, who takes a bill of exchange, must know where to call upon the drawee, and undertakes to demand the money of him.

When that bill of exchange is indorsed by the person to whom it was made payable, as between the indorser and indorsee, it is a new bill of exchange, and the indorser stands in the place of the drawer: the indorsee undertakes to demand the money of the drawee. If he neglects and the drawee becomes insolvent, the loss falls upon himself. If the indorsee is diligent, and the drawee refuses payment, his immediate remedy is against the indorser; and it was very properly observed that the Act of 9, 10 W. III., requires notice of the protest to be given "to the person from whom the bill was received." He may have

[1] The arguments of counsel have been omitted. — ED.

another remedy against the first drawer, as assignee to, and standing in the place of, the indorser.

The indorsee does not trust to the credit of the original drawer: he does not know whether such a person exists or where he lives, or whether his name may have been forged. The indorser is his drawer, and the person to whom he originally trusted, in case the drawee should not pay the money. There is no difference in this respect between foreign and inland bills of exchange, except as to the degree of inconvenience: all the arguments from law and the nature of a transaction are exactly the same in both cases.

As to foreign bills of exchange, the question was solemnly determined by this court, upon very satisfactory grounds, in the case of Bromley v. Frazier,[1] that was "an action upon the case upon a foreign bill of exchange, by the indorsee against the indorser;" and on general demurrer it was objected "that they had not shown a demand upon the drawer, in whose default only it is that the indorser warrants." And because "this was a point unsettled," and on which there are contradictory opinions in Salkeld, 131 and 133, the court took time to consider of it. And on the second argument they delivered their opinions, "that the declaration was well enough for the design of the law of merchants in distinguishing these from all other contracts, by making them assignable, was for the convenience of commerce, that they might pass from hand to hand in the way of trade, in the same manner as if they were specie. Now, to require a demand upon the drawer will be laying such a clog upon these bills as will deter everybody from taking them. The drawer lives abroad, perhaps in the Indies, where the indorsee has no correspondent to whom he can send the bill for a demand; or if he could, yet the delay would be so great that nobody would meddle with them. Suppose it was the case of several indorsements, must the last indorsee travel round the world before he can fix his action upon the man from whom he received the bill? In common experience, everybody knows that the more indorsements a bill has, the greater credit it bears: whereas, if those demands are all necessary to be made, it must naturally diminish the value, by how much the more difficult it renders the calling in the money. And as to the notion that has prevailed, that the indorser warrants only in default of the drawer, there is no color for it, for every indorser is in the nature of a new drawer; and, at Nisi Prius, the indorsee is never put to prove the hand of the first drawer, where the action is against an indorser. The requiring a protest for non-acceptance is not because a protest amounts to a demand; for it is no more than a giving notice

[1] 1 Stra. 441.

to the drawer to get his effects out of the hands of the drawee, who (by the other's drawing) is supposed to have sufficient wherewith to satisfy the bill." Upon the whole, they declared themselves to be of opinion "that, in the case of a foreign bill of exchange, a demand upon the drawer is not necessary to make a charge upon the indorser; but the indorsee has his liberty to resort to either for the money: consequently, the plaintiff (they said) must have judgment."

Every inconvenience here suggested holds to a great degree, and every other argument holds equally in the case of inland bills of exchange.

We are therefore all of opinion "that, to entitle the indorsee of an inland bill of exchange to bring an action against the indorser, upon failure of payment of the drawee, it is not necessary to make any demand of, or inquiry after, the first drawer."

The law is exactly the same, and fully settled upon the analogy of promissory notes to bills of exchange, which is very clear, when the point of resemblance is once fixed.

While a promissory note continues in its original shape of a promise from one man to pay to another, it bears no similitude to a bill of exchange. When it is indorsed, the resemblance begins; for then it is an order by the indorser upon the maker of the note (his debtor by the note) to pay to the indorsee. This is the very definition of a bill of exchange.

The indorser is the drawer, the maker of the note is the acceptor, and the indorsee is the person to whom it is made payable. The indorser only undertakes, in case the maker of the note does not pay. The indorsee is bound to apply to the maker of the note, he takes it upon that condition, and therefore must, in all cases, know who he is and where he lives; and if, after the note becomes payable, he is guilty of a neglect, and the maker becomes insolvent, he loses the money and cannot come upon the indorser at all.

Therefore, before the indorsee of a promissory note brings an action against the indorser, he must show a demand, or due diligence to get the money from the maker of the note; just as the person to whom the bill of exchange is made payable must show a demand, or due diligence to get the money from the acceptor, before he brings an action against the drawer. This was determined by the whole Court of Common Pleas, upon great consideration, in Pasch. 4 G. II., as cited by my Lord Chief Justice Lee, in the case of Collins *v.* Butler.[1]

So that the rule is exactly the same upon promissory notes as it is upon bills of exchange; and the confusion has, in part, arisen from the maker of a promissory note being called the drawer; whereas, by comparison to bills of exchange, the indorser is the drawer.

[1] 2 Stra. 1067.

All the authorities, and particularly Lord Hardwicke, in the case of Hammerton v. Mackrel[1] (according to my brother Denison's state of what his lordship said), put promissory notes and inland bills of exchange just upon the same footing, and the statute expressly refers to inland bills of exchange.

But the same law must be applied to the same reason, to the substantial resemblance between promissory notes and bills of exchange; and not to the same sound, which is equally used to describe the makers of both.

My Lord Chief Justice Holt is quoted as being of opinion "that, in actions upon bills of exchange, it is necessary to prove a demand upon the drawer." For proof of this, the principal case referred to is that of Lambert v. Oakes, reported in three books, 1 Ld. Raymond, 1 Salk., and 12 Mod.

In 1 Ld. Raym. 443, it appears manifestly that the question arose upon a promissory note. "R. signed a note under his hand, payable to Oakes or his order; Oakes indorsed it to Lambert; upon which Lambert brought the action for the money against Oakes. *Per* Holt C. J., he ought to prove that he had demanded, or done his endeavor to demand, this money of R. before he can sue Oakes upon the indorsement The same law, if the bill was drawn upon any other person, payable to Oakes or order;" that is, "A demand must be made of the person upon whom the bill is drawn." And other parts of the case manifestly show this to have been the meaning. For my Lord Chief Justice Holt is reported to have said, "The indorsement will subject the indorser to an action; because it makes a new contract, in case the person upon whom it is drawn does not pay it." Again, "If the indorsee does not demand the money payable by the bill of the person upon whom it is drawn in convenient time, and afterwards he fails, the indorser is not liable."

In Salkeld, the case is confounded: it is stated to be a bill of exchange, and "that the demand must be made upon the drawer, or him upon whom it was drawn." My Lord Chief Justice Holt had said that a demand must be made of the maker of a promissory note (calling him the drawer), and, in the case of a bill of exchange, of him upon whom the bill is drawn. The report jumbles both together, as applied only to a bill of exchange; misled, I dare say, by the equivocal sound of the term drawer, and by the Chief Justice's reasoning, in the case of a promissory note, from the law upon bills of exchange.

In 12 Modern, 244, the case is mistaken too, and stated as upon a bill of exchange, and as a determination "that there must be a demand upon the drawer of the bill of exchange;" and yet the report itself

[1] M. 10 G. II.

shows demonstrably that what was said by my Lord Chief Justice Holt was applied to the maker of a promissory note (calling him the drawer). For the report makes him argue, "So if the bill was drawn on any other person, payable to Oakes or order," which shows that the case in judgment was not a bill drawn upon another person, but payable only to Oakes, by R. himself.

It seems to me as if Lord Chief Justice Holt, in that case, had considered the drawee of a bill of exchange in the same light as the maker of a promissory note; but loose and hasty notes, misled by identity of sound, have misapplied what was said of the drawer of a promissory note to the drawer of a bill of exchange, and to such a degree misapplied it that two reports out of the three have stated the question as arising upon a bill of exchange, which is manifestly otherwise.

But, be this conjecture as it may, we are all of opinion "that in actions upon inland bills of exchange, by an indorsee against an indorser, the plaintiff must prove a demand of, or due diligence to get the money from the drawee (or acceptor), but need not prove any demand of the drawer; and that, in actions upon promissory notes by an indorsee against the indorser, the plaintiff must prove a demand of, or due diligence to get the money from, the maker of the note."

Accordingly, the rule was, that the postea be delivered to the plaintiff.[1]

BLESARD *v.* HIRST AND ANOTHER.

IN THE KING'S BENCH, NOVEMBER 20, 1770.

[*Reported in* 5 *Burrow*, 2670.]

THIS was an action brought against the defendants, who are partners in trade, as indorsers of a bill of exchange. The defendants pleaded the general issue. And on the trial it appeared in evidence that William Topham, of Leeds, in the county of York, on the 8th day of March, 1769, drew a bill of exchange on Messrs. Klotz, in London, bearing date the same day, for £30, payable six weeks after date,

[1] Harry *v.* Perrit, 1 Salk. 134; Bomley *v.* Frazier, 1 Stra. 441; Lawrence *v.* Jacob, 1 Stra. 515; Lake *v.* Hayes, 1 Atk. 281, *accord.*

Anon. Holt, 115; Borough *v.* Perkins, 1 Salk. 131, *contra.*

Conf. Syderbottom *v.* Smith, 1 Stra. 649; Collins *v.* Butler, 2 Stra. 1087; Hamilton *v.* Mackrell, C. T. Hard. 322. — ED.

to the defendants, or order, for value received, who indorsed it to the plaintiff, on the 18th March; the plaintiff, who resides at Bradford, in Yorkshire, sent the bill to Lewis & Martin, his correspondents in London, who received it on the 21st March, and on that day, or the next day after, presented it to Messrs. Klotz, on whom it was drawn, for acceptance, who then refused to accept it. On the 22d of April, which was the day on which the bill became due, it was presented by Lewis & Martin, and protested for non-payment. That Topham, the drawer, continued in credit till the 11th of April, soon after which a commission of bankrupt issued against him; that no notice was given of the refusal to accept the bill, but on the 29th of April the plaintiff gave notice to the defendants that Messrs. Klotz had refused to pay the bill, and that it was returned, with charges of protest. On the 2d of May, one of the defendants called at the plaintiff's, in his way from his own house to Leeds, and told the plaintiff he would take up the bill as he came back; but, on his return, he said he had been advised that he was not bound to do it. Plaintiff had a verdict for £30, subject to the opinion of the Court of King's Bench upon the question whether, under the circumstances of this case, the plaintiff is entitled to recover.

James Wallace, for plaintiff.

John Lee, for defendants.

The fact, therefore, was that an inland bill of exchange was drawn by Topham upon Messrs. Klotz, and was indorsed by the defendants to the plaintiff, who presented it for acceptance. It was refused to be accepted. The plaintiff kept it in his hands three weeks, without giving notice to the person from whom he received it that it had been refused to be accepted. Topham remained in good credit during these three weeks, and then failed before the time of payment came.

The question was "whether the plaintiff, the holder of the bill, could recover of the person from whom he received it, when he had thus neglected to give him notice of the refusal to accept it."

Mr. Davenport argued it for the plaintiff, *Mr. Lee* for the defendants.

Mr. Davenport said that no such notice was necessary to be given. He owned that it might have been more candid to have given it; but he denied that the law required it. At common law, there was no need to present an inland bill of exchange for acceptance. The 3 & 4 Anne, c. 9, extends the protesting of inland bills of exchange given by 9 & 10 W. III. c. 17, for non-payment, to the case of non-acceptance; but neither of these acts takes away the remedy upon the bill itself, which the payee before had.

Mr. Lee said the question was not whether the holder of the bill was obliged to present it for acceptance. Here he did present it; and

it was refused, and the indorser of the bill ought to have been apprised of it. If any damage happens for want of notice, the person who neglects to give the notice ought to be the sufferer. It is a fraud to conceal it. Other persons may be greatly injured by such concealment. Topham remained three weeks in good credit, so that the indorser might have saved himself, if he had had notice of the refusal to accept. He cited Molloy, Lib. 2, c. 10, § 15; and Mareish's advice concerning bills of exchange, 1670, p. 50 (in the small edition); and the case of Heylyn and others v. Adamson.

Mr. Davenport, in his reply, cited 1 Ld. Raym. 743, and 8 Bacon's Abridgment, 612, tit. "Merchant and Merchandise," letter L, No. 7, of the protest: "A protest does not raise any debt," &c.

LORD MANSFIELD observed that this is a matter of great consequence to trade and commerce, especially in this country and at this time. This is an inland bill made payable to one man, and indorsed by him to a third man. This third man tenders it for acceptance, and it is refused. He keeps it three weeks without giving any notice of such refusal to accept. He ought to have given notice of this refusal, and not to have concealed it; and, by not giving notice, he has taken the risk upon himself. The indorser of the bill is imposed upon. The person who neglected to give the notice ought to suffer for it.

The question is not whether he was obliged to present it for acceptance. He has done so, and it was refused.

There is no difference between an inland bill and a foreign one in this case. They are both now upon the same foot. Heylyn and others v. Adamson, in this court.

MR. JUSTICE WILLES and MR. JUSTICE ASHHURST concurred in opinion with his lordship. They held that the holder of the bill ought to suffer for having neglected to give notice to the person from whom he received it of the drawee's refusal to accept it. And MR. JUSTICE ASHHURST added that it was understood (upon inquiry) to be the practice of merchants, as well as agreeable to the reason of the thing, that notice should be given.

MR. JUSTICE ASTON was gone into chancery.

Ordered that the postea be delivered to the defendants.[1]

[1] Roscow v. Hardy, 12 East, 434; Bartlett v. Benson, 14 M. & W. 733; Stanton v. Blossom, 14 Mass. 116; Austin v. Rodman, 1 Hawks, 194; Thompson v. Cumming, 2 Leigh. 321, *accord.*

But the drawer of a bill containing the words "acceptance waived" is not entitled to notice of non-acceptance. Denegre v. Milne, 10 La. An. 824; English v. Wall, 12 Rob. (La.) 132; Webb v. Mears, 45 Pa. 222; Carson v. Russell, 26 Tex 452. See Reg. v. Kinnear, 2 M. & Rob. 117. — ED.

DAGGLISH v. WEATHERBY.

In the Common Pleas, Hilary Term, 1771.

[*Reported in* 2 *William Blackstone*, 747.]

Weatherby drew three bills of exchange on Morley, payable to Dagglish. Two were tendered for payment and refused. No account was given of the third.

Dagglish brought this action against the drawer for the value; but not proving any notice given to the drawer of the non-payment, or that the drawer was insolvent, or had absconded, De Grey, C. J., at Nisi Prius, nonsuited the plaintiff.

Jephson moved to set aside the nonsuit, and for a new trial, because no such notice to the drawer is necessary; but afterwards, despairing to support his motion, and having consented to be nonsuited at the trial, the rule was, without argument, *Discharged.*[1]

AURIOL AND ANOTHER v. THOMAS.

In the King's Bench, June 27, 1787.

[*Reported in* 2 *Term Reports*, 52.]

On a motion to set aside a writ of inquiry for excessive damages, it appeared that the plaintiffs were the indorsees of a bill of exchange drawn here by G. Campbell for 2,800 star pagodas, payable to the defendant or order, and directed to G. Mowbry, Esq., at Madras. The plaintiffs discounted the bill, giving the then current price of the exchange, which was 6*s.* 6*d.* per pagoda. They sent it to Madras, from whence it was returned to England, protested for non-acceptance, and also for non-payment; on which the plaintiffs demanded and recovered at the rate of 10*s.* per pagoda, and £5 per cent from the expiration of thirty days after notice to the defendant of its being returned.

[1] Darrach *v.* Savage, 1 Show. 155; Rushton *v.* Aspinall, 2 Doug. 679; Alexandria Bank *v.* Young, 2 Cranch, C. C. 52; Anderson *v.* Yell, 15 Ark. 9; Dwight *v.* Scovil, 2 Conn. 654; Beckwith *v.* Carleton, 14 Ga. 691; Ford *v.* Booker, 58 Ind. 395; Red Oak Bank *v.* Orvis, 40 Iowa, 332; Webber *v.* Matthews, 101 Mass. 481; Capitol Bank *v.* Lane, 52 Miss. 677; Long *v.* Stephenson, 72 N. Ca. 569; Kilpatrick *v.* Heaton, 3 Brev. 92, *accord.*

The guarantor of a note is not entitled to notice of its dishonor by the maker. Walton *v.* Mascall, 13 M. & W. 72; Gage *v.* Mech. Bank, 79 Ill. 62; Woolley *v.* Van Valkeley, 16 Kas. 20; Taylor *v.* McCune, 11 Pa. 460. — Ed.

Wood showed cause, and contended that this could not be considered as an usurious demand, because the usage as well as the particular agreement of the defendant had been proved before the jury to charge at the rate of 10*s.* per pagoda for bills returned from India protested, and £5 per cent after thirty days' notice to the defendant of non-payment, which included all incidental charges.

Philips, in support of the rule, cited the case of Benson *v.* Parry,[1] where it was held to be usury for country bankers to take more than £5 per cent on inland bills payable at another place; and, if the practice be contrary to law, no usage can make it good.

BULLER, J.[2] The case of Benson *v.* Parry, at Hereford, was determined on a mistake; but when it was more maturely considered by this court, on a motion for a new trial, they were unanimously of opinion that extra charges might be allowed, though they amounted to more than £5 per cent, if they were fair and reasonable, and not as a color for usury; and there a new trial was granted. This doctrine was again recognized in two *nisi prius* cases, — the one before the Lord Chief Baron Eyre on the circuit, the other before me at the sittings at Westminster. So that it is now clearly settled that the party is entitled to take not only £5 per cent for legal interest, but also a reasonable sum for remitting and other necessary incidental expenses. The demand in the present case arises upon a bill of exchange payable in India, which, if not paid there when due, would carry the interest allowed in that country; and it is admitted that the constant course with respect to bills returned protested from India has been to allow at the rate of 10*s.* per pagoda, which includes interest, exchange, and all other charges. There cannot, therefore, be any color for saying that this transaction is usurious.

GROSE, J. The same doctrine has been confirmed in the Court of Common Pleas. And the line which has been taken is that, if the sum charged be not a color or a screen for usury, but is only fair and reasonable, it ought to be allowed. This is like the case, some few years ago, where Indian interest was allowed here on a bond given in India.[3] *Rule discharged.*

[1] Summer assizes at Hereford, 1780.

[2] Ashhurst, J., was absent.

[3] Bodily *v.* Bellamy, 2 Burr. 1094.

GALE v. WALSH.

IN THE KING'S BENCH, MAY 4, 1793.

[*Reported in* 5 *Term Reports*, 289.]

IN an action against the drawer of a foreign bill of exchange, the question was whether it was necessary to prove a protest for non-acceptance, which was reserved by Lord Kenyon, before whom it was tried at the sittings after last Michaelmas term, when a verdict was taken for the plaintiff.

Mingay, for the defendant, moved, in last Hilary term, to enter a nonsuit; and the court thought the matter so clear on the ground of the protest being part of the custom of merchants in the case of a foreign bill that they suggested to the counsel for the plaintiff the expediency of making the rule absolute in the first instance to save unnecessary expense; and the rule was then made absolute.[1]

[1] Brough *v.* Parkings, 2 Ld. Ray. 992; Rogers *v.* Stephens, 2 T. R. 713; Orr *v.* Maginnis, 7 East, 359 (*semble*); Armani *v.* Castrique, 13 M. & W. 443 (*semble*); Union Bank *v.* Hyde, 6 Wheat. 572; Dennistown *v.* Stewart, 17 How. 606; Ticonic Bank *v.* Stackpole, 41 Me. 302; Thompson *v.* Cumming, 2 Leigh, 821, *accord*.

A protest is never necessary upon an inland bill. Windle *v.* Andrews, 2 B. & Al. 696; Bailey *v.* Dozier, 6 How. 23; Smith *v.* Curlee, 59 Ill. 221; Bank of U. S. *v.* Leathers, 10 B. Mon. 64; Hubbard *v.* Troy, 2 Ired. 134. Nor is it evidence of dishonor. Union Bank *v.* Hyde, 6 Wheat. 572; Bank of U. S. *v.* Leathers, 10 B. Mon. 64.

A bill drawn in one State payable in another State is a foreign bill, and must be protested accordingly for non-payment. Buckner *v.* Finley, 2 Pet. 586; Strawbridge *v.* Robinson, 10 Ill. 470 (*semble*); Thorpe *v.* Craig, 10 Iowa, 461; Chenowith *v.* Chamberlin, 6 B. Mon. 60; Phœnix Bank *v.* Hussey, 12 Pick. 483; Wells *v.* Whitehead, 15 Wend. 527; Allen *v.* Suydam, 22 Wend. 215, 226; Fitler *v.* Morris, 6 Whart. 406; Aborn *v.* Bosworth, 1 R. I. 401; Duncan *v.* Course, 1 Mill. C. R. 100; Cape Fear Bank *v.* Stinemetz, 1 Hill (S. Ca.), 44. But see *contra*, Robinson *v.* Johnson, 1 Mo. 434; Case *v.* Heffner, 10 Oh. 180 (*semble*); McMurchey *v.* Robinson, 10 Oh. 496. So also a protest of such bills is evidence of presentment and dishonor. Lonsdale *v.* Brown, 4 Wash. 86, 148; Harmon *v.* Wilson, 1 Duv. 322; Schneider *v.* Cochrane, 9 La. An. 235; Green *v.* Jackson, 15 Me. 136; Freeman's Bank *v.* Perkins, 18 Me. 292; Warren *v.* Coombs, 20 Me. 189; Halliday *v.* McDougall, 20 Wend. 81; 22 Wend. 264.

It has been held that a note payable in one State and indorsed in another State must be protested upon non-payment, in order to charge the indorser. Piner *v.* Clary, 17 B. Mon. 645. But see *contra*, Bonar *v.* Mitchell, 5 Ex. 415; Young *v.* Bryan, 6 Wheat. 146; Union Bank *v.* Hyde, 6 Wheat. 572; Smith *v.* Little, 10 N. H. 526. It has also been held that a protest of such notes, though not required, is nevertheless evidence of presentment for payment and dishonor. Carter *v.* Burley, 9 N. H. 558 (*semble*); Williams *v.* Putnam, 14 N. H. 540. But see *contra*, Kirtland *v.* Wanzer, 2 Duer, 278.

Whenever a protest is necessary, it obviously forms a condition precedent to the liability of a drawer or indorser, the performance of which should be alleged in the declaration. But in Salomons *v.* Stavely, 3 Doug. 298, a declaration on a foreign bill was held good on general demurrer, although it contained no allegation of a protest.

CROMWELL AND ANOTHER v. HYNSON

AT NISI PRIUS, CORAM LORD KENYON, C. J., DECEMBER 8, 1796.

[*Reported in* 2 *Espinasse*, 511.]

THIS was an action to recover the amount of a bill of exchange, of which the following is a copy:—

"JAMAICA, MONTEGO BAY, Sept. 4, 1795.

"Ninety days after sight, pay to Mr. Joseph Hynson, or order, £200 sterling, value received, &c. BENJAMIN LYON.

"To Sir P. H. CLERK, Bart., at Messrs. Davidson and Graham, London."

This bill was indorsed by Hynson, the defendant, to the plaintiff, in Jamaica, where Hynson (who was the master of a ship) then was; but his residence was in England, he having a dwelling-house at Stepney Causeway, where his family lived.

The bill was presented for acceptance to the drawee, and refused; upon which it was immediately protested, and then sent to Hynson's house at Stepney Causeway for payment, with notice of its non-acceptance.

Hynson was not then in England; but the bill was shown to his wife, from whom payment was demanded, and she was informed of all the circumstances of non-payment, &c.

This was given in evidence by the plaintiff.

For the defendant, *Garrow* stated his defence to be,—1st, that the notice given to Hynson, the defendant, as the indorser, should have been sent to Jamaica, where he was at the time when he indorsed the bill; 2dly, that a demand on the wife was not sufficient; 3dly, that it was necessary, and the established usage among merchants, which he stated he was prepared with evidence to show, that when notice is given of the non-acceptance or non-payment of a bill, it should always be accompanied with a copy of the protest.

LORD KENYON overruled all the objections, and the plaintiff had a verdict to the amount of the bill.[1]

The court in this case seem to have lost sight of the fact that a protest serves a double purpose, being not merely evidence of presentment for payment and dishonor, but constituting also an independent solemnity which is essential to fix the liability of a drawer or indorser of a foreign bill. See also Armani v. Castrique, 13 M. & W. 443; Jordan v. Bell, 8 Port. 58. — ED.

[1] Dennistoun v. Stewart, 17 How. 606; Wallace v. Agry, 4 Mas. 336; Lenox v. Leverett, 10 Mass. 1 (*semble*); Wells v. Whitehead, 15 Wend. 527, *accord*.

See Goostrey v. Mead, Bull. N. P. 272; Robins v. Gibson, 1 M. & Sel. 288. — ED.

MELLISH AND ANOTHER v. SIMEON.

IN THE COMMON PLEAS, NOVEMBER 27, 1794.

[*Reported in* 2 *Henry Blackstone*, 378.]

ON the 9th of July, 1793, two bills of exchange were drawn by Simeon in London, on Boyd & Co. in Paris; one for 35,000, the other for 36,000 livres Tournois, amounting together to £603 19*s.* 10*d.* sterling, according to the rate of exchange between London and Paris of 6½*d.* for the French crown of three livres, and payable to the order of Mellish & Co., who indorsed them in London to Jeysset & Co. at Amsterdam. Jeysset & Co. indorsed them to Meryolet at Amsterdam, and Meryolet to Androine at Paris. When they were presented for acceptance, Boyd & Co. refused to accept them, but promised that they should be paid when they became due.

In the mean time, the French convention passed a decree prohibiting the payment of any bills drawn in any of the countries at war with France, and, of course, the bills in question were not paid. In consequence of this, they were sent back by Androine to Meryolet at Amsterdam, protested for non-acceptance and non-payment; and at the same time Androine drew another bill of Meryolet for the amount of them, at the rate of 18⅛ groots for the French crown of three livres, for the re-exchange between Paris and Amsterdam, together with the ordinary charges; which bill Meryolet paid, and was reimbursed by Jeysset & Co., by compromise between them, at the rate of 18 groots for the French crown, amounting to £905 13*s.* 9*d.* sterling, for which sum, together with charges at Amsterdam and the re-exchange between that place and London, making in the whole £913 4*s.* 3*d.* sterling, Jeyssett & Co. drew a bill on Mellish & Co., which they paid, and took back the former bills, on which they brought the present action against Simeon, the drawer, and recovered a verdict for the whole sum of £913 4*s.* 3*d.* And now *Le Blanc*, Serjt., moved for a new trial, on the ground that the defendant was not liable for the loss on the re-exchange. It is true, he said, that the drawer of a bill of exchange undertakes, by the act of drawing it, that the drawee shall be found in the place where he is described to be, and shall have effects in his hands; but the undertaking does not extend to the case of a prohibition to accept or pay the bill imposed by the law of a foreign country in which the drawee resides. When a person takes a bill circumstanced as this was, he must submit to the laws of that country. There was no default in the drawer: he therefore cannot, in justice, be liable for

more than the sum he originally received for the bills, with interest, and the expenses of protesting them.

LORD CHIEF JUSTICE EYRE. I see no distinction between this case and the common one of a bill being refused payment. The drawer must pay for all the consequences of the non-payment, and the loss on the re-exchange seems to me to be part of the damages arising from the contract not being performed. I thought, indeed, at the trial that it might be a question whether the drawer were liable for the re-exchange occasioned by the circuitous mode of returning the bills through Amsterdam, but the jury decided it.

BULLER, J. What is the engagement of the drawer of a bill of exchange? He undertakes that the bill shall be paid when due. If it be not paid, it is not necessary for the holder to inquire for what reason it is not paid; and, if the holder has been guilty of no default, the drawer is answerable for the amount of the bill; and, if he is liable for the bill, he must also be liable for the re-exchange, which is a consequence of the bill not being paid.

HEATH, J., of the same opinion. He who undertakes for the act of another undertakes that it shall be done at all events.

ROOKE, J., of the same opinion. *Rule refused.*

WIFFEN v. ROBERTS.

AT NISI PRIUS, CORAM LORD KENYON, C. J., FEBRUARY 1, 1795.

[*Reported in* 1 *Espinasse*, 261.]

THIS was an action of assumpsit against the defendant, as the drawer of a bill of exchange.

Plea, of the general issue.

The bill was drawn by one Roberts, in favor of Thomas Ould or order, on Thomas Yates, for £86, dated 1st of November, 1793, payable three months after date.

Yates accepted it, but did not pay it; and the defendant was therefore sued as drawer, on his default.

The defence on the merits was that the plaintiff (the indorsee) knew that the bill was an accommodation one between Yates and the defendant, and, besides, had not paid the full value for it.

The first witness called for the plaintiff, on his cross-examination, proved that the bill was really an accommodation bill, and that it was known by the plaintiff to be so, and that he, in fact, had given for it but £29.

LORD KENYON said that where a bill of exchange is given for money

really due from the drawee to the drawer, or is drawn in the regular course of business, in such case the indorsee, though he has not given to the indorser the full amount of the bill, yet may recover the whole, and be the holder of the overplus above the sum he has really paid, to the use of the indorser; but where the bill is an accommodation one, and that known to the indorsee, and he pays but part of the amount, in such case he can only recover the sum he has actually paid for the bill; and, if the plaintiff in this case was entitled to recover, he could only do it to the amount of £29, the sum he really paid for it.

To prove a demand of payment of the bill from Yates, the acceptor, the plaintiff called the notary by whom it had been made. On producing the bill to him, it appeared that it had been noted as demanded, on the 3d of February; and he admitted that it had been demanded on that day.

Lord Kenyon said that the plaintiff must be called; that the bill did not become payable until the 4th of February, which was allowing the three days of grace, after the first of that month, when the bill became due; and that non-payment by the acceptor, on the day before the bill became due, was not such a default in him as could authorize the holder to have recourse to the drawer.

The plaintiff was nonsuited.[1]

ENGLISH v. DARLEY.

In the Common Pleas, January 27, 1800.

[*Reported in 2 Bosanquet & Puller*, 61.]

Assumpsit by the indorsee of a bill of exchange against the indorser.

Lord Eldon, C. J., before whom the cause was tried at the Westminster sittings after last Michaelmas term, nonsuited the plaintiff, under the following circumstances: Payment of the bill being refused when due, the plaintiff commenced actions against the present defendant and the acceptor, and, having sued the latter to judgment, took out execution thereon; but, although the accepter had sufficient to answer the execution, the plaintiff, at his instance, received £100 in part payment of the bill, and took his bond and warrant of attorney as a security for the payment of the remainder by instalments, together

[1] Mitchell v. De Grand, 1 Mas. 176; Farmers' Bank v. Duvall, 7 Gill & J. 78; Mechanics' Bank v. Merchants' Bank, 6 Met. 13; Griffin v. Goff, 12 Johns. 428; McMurchey v. Robinson, 10 Oh. 496; Jackson v. Newton, 8 Watts, 401, *accord*. — Ed.

with interest and costs, excepting only a nominal sum, with a view to enable him, the plaintiff, to support actions against the other parties to the bill.

Shepherd and *Lens*, Serjts., now moved for a new trial, and contended that the holder of a bill of exchange after due notice given of non-payment is entitled to sue all or any of the parties whose names are on the bill; and that although he receive from any one of them what may amount to a satisfaction as against him, yet that the others will not be discharged until the whole amount of the bill be paid, as in Macdonald *v.* Bovington,[1] where the holder of a bill having sued the acceptor, and charged him in execution, he was allowed to sue the drawer on the acceptor being discharged by an insolvent act; and in Hayling *v.* Mulhall,[2] where it was laid down that the holder, after having discharged one of the indorsers, whom he had taken in execution, by a letter of license, might sue a prior indorser. They insisted that each of the parties to the bill was in the nature of a co-surety, and therefore nothing short of actual payment by one of them could be considered as a satisfaction in an action against any of the others, and cited Dyke *v.* Mercer.[3]

Lord Eldon, C. J. It is very clear that the holder of a bill may at his election sue any or all the parties to it, and that, if they all become bankrupt, he may prove against the estates of all, unless he receive part of the debt from any one. And, although the debt be reduced from time to time by dividends, no part of the proof shall be expunged under any of the commissions till 20*s.* in the pound have been received. As long as the holder is passive, all his remedies remain;[4] and if any of the parties be discharged by the act of law, as by an insolvent debtor's act, that operation of law shall not prejudice the holder.[5] With respect to Hayling *v.* Mulhall, it may be observed

[1] 4 Term Rep. 825. [2] 2 Bl. 1235. [3] 2 Show. 394.

[4] The anomalous doctrine of Pain *v.* Packard, 13 Johns. 174, that a creditor who fails to proceed against the debtor, at the surety's request, thereby discharges the surety, which obtains in New York and a few other States (2 Wh. & Tud. L. C., 4th Am. ed., 1904; 2 Am. L. C. 5th ed. 414), is held not to apply as between the holder of a bill or note and the parties successively liable thereon. Trimble *v.* Thorne, 16 Johns. 152; Beardsley *v.* Baldwin, 6 Wend. 610; 8 Wend. 194, s. c.; Wells *v* Mann, 45 N. Y. 327; Beebe *v.* West Branch Bank, 7 W. & S. 375. — Ed.

[5] "No discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, indorser, surety, or otherwise." U. S. Rev. Stats. § 5118.

So also the discharge of a party to a bill or note under the composition clause of the English Bankruptcy Act, 32 & 33 Vict. c. 71, § 126, or the United States bankrupt law, U. S. St., June 22, 1874, § 17, does not release the parties subsequently liable on the instrument, whether the holder has or has not assented to the resolution for composition. *Ex parte* Jacobs, L. R. 10 Ch. 211; Guild *v.* Butler, 122 Mass. 498. — Ed.

that the marginal abstract of that case is incorrect; for it appears from the report that the person first sued was a subsequent indorser. Had the plaintiff first sued a prior indorser, and discharged him from execution, it would have afforded a sufficient objection to an action against a subsequent indorser. If a holder enter into an agreement with a prior indorser in the morning not to sue him for a certain period of time, and then oblige a subsequent indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. In the case *Ex parte* Smith,[1] Lord Thurlow, after consulting with all the judges, was of opinion that the holder of a bill, by entering into a composition with the acceptor, discharged the indorser, and accordingly ordered the proof against the estate of the latter to be expunged, proceeding on the ground of the acceptors' liability being varied by the act of the holder. We all remember the case where Mr. Richard Burke, being co-surety for an annuity, the grantee gave time to the principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was; but it was answered that the grantee could make no demand upon the co-surety, because he must by so doing enforce a payment from the principal contrary to the agreement. Here the plaintiff, having taken a new security from the acceptor, has discharged the defendant.

HEATH and ROOKE, JJ., were of the same opinion.

Shepherd and *Lens* took nothing by their motion.[2]

[1] Co. Bl. 168, 172, ed. 4.

[2] Hayling *v.* Mullhall, 2 W. Bl. 1235; Smith *v.* Knox, 3 Esp. 46; Gould *v.* Robson, 8 East, 576; Claridge *v.* Dalton, 4 M. & S. 232; Hall *v.* Cole, 4 A. & E. 577; Moss *v.* Hall, 5 Ex. 46; Frazer *v.* Jordan, 8 E. & B. 303; McLemore *v.* Powell, 12 Wheat. 554 (*semble*); Bank of U. S. *v.* Hatch, 6 Pet. 250; Inge *v.* Branch Bank, 8 Port. 108; Couch *v.* Waring, 9 Conn. 261; Sargent *v.* Appleton, 6 Mass. 88 (*semble*); Woodman *v.* Eastman, 10 N. H. 359; Fowler *v.* Brooks, 13 N. H. 240; Lynch *v.* Reynolds, 16 Johns. 41 (*semble*); Hubbly *v.* Brown, 16 Johns. 70; Newcomb *v.* Raynor, 21 Wend. 108, *accord*.

If, at the time of discharge or indulgence given to one of the parties to a bill, the holder expressly reserves his rights against subsequent parties, the latter will continue liable as before. *Ex parte* Glendinning, Buck, 517; Bateson *v.* Gosling, L. R. 7 C. P. 9; Muir *v.* Crawford, L. R. 2 Sc. Ap. 456; Clagett *v.* Salmon, 5 Gill & J. 314; Tobey *v.* Ellis, 114 Mass. 120; Wagman *v.* Hoag, 14 Barb. 282, 289 (*semble*); Hagey *v.* Hill, 75 Pa. 108; Morse *v.* Huntington, 40 Vt. 488. See *contra*, Gustine *v.* Union Bank, 10 Rob. (La.) 412. Conf. Hutchins *v.* Nichols, 10 Cush. 299.

The liability of a party to a bill, against whom the holder has obtained a judgment or decree, is not affected by a subsequent discharge or indulgence given to a prior party. Pole *v.* Ford, 2 Chitty, 125; Bray *v.* Manson, 8 M. & W. 668; Jenkins *v.* Robertson, 2 Drew. 351; Lenox *v.* Prout, 8 Wheat. 520; Findlay *v.* Bank of U. S., 2 McL. 44; Bay *v.* Tallmadge, 5 Johns. Ch. 305; LaFarge *v.* Herter, 8 Den.

BALLINGALLS AND ANOTHER v. ARCHIBALD GLOSTER.

IN THE KING'S BENCH, MAY 4, 1808.

[*Reported in* 8 *East*, 481.]

THE plaintiffs, as indorsees of a bill of exchange, declared that one John Gloster, on the 26th of March, 1802, at the island of St. Vincent, in parts beyond the seas, according to the custom of merchants, drew a bill of exchange for £250, of that date, directed to one J. Jackson, and required him, at ninety days' sight, to pay the same to the order of the defendant; that the defendant afterwards, and before payment of the same, indorsed the bill to the plaintiffs or their order. That they afterwards, on the 10th of August, presented the bill for acceptance to J. Jackson, who refused to accept the same; and thereupon the plaintiffs caused it to be duly protested for non-acceptance; of which premises the defendant had notice, and, according to the custom of merchants, became liable to pay to the plaintiffs the sum of money in the bill mentioned when he should be requested, and being so liable he promised to pay, &c.

The facts appearing in evidence before Lord Ellenborough, C. J., at Guildhall, were that the bill in question was passed to the plaintiff's agent at Trinidad by the original drawer, with the indorsement of the defendant upon it, for a valuable consideration; that the bill was presented and protested for non-acceptance on the 10th of August; after which, on the 30th of October, this action was commenced before the bill fell due, which was not till the 11th of November. And the only question was whether, upon non-acceptance of a bill, the indorsee has a right immediately to sue the indorser as a new drawer, without waiting for the time when the bill becomes due, it having been decided in Milford *v.* Mayor[1] that such action lies against the original drawer.

157; Hubbell *v.* Carpenter, 2 Barb. 484. But see *contra*, Carpenter *v.* Devon, 6 Ala. 718; Carpenter *v.* King, 9 Met. 511; Rice *v.* Morton, 19 Mo. 263; Smith *v.* Rice, 27 Mo. 505; Dixon *v.* Ewing, 3 Oh. 280; Comm. Bank *v.* Western Bank, 11 Oh. 444; Manufacturers' Bank *v.* Bank of Pa., 7 W. & S. 335 (see Hagey *v.* Hill, 75 Pa. 108, 111); Shelton *v.* Hurd, 7 R. I. 403; Parker *v.* Nations, 33 Tex. 210 (statutory); Baird *v.* Rice, 1 Call, 18. — ED.

[1] Dougl. 54. [January 26, 1779. "On a rule to show cause why the defendant should not be discharged. The ground was that, by the affidavit on which he was held to bail, it was sworn that he was indebted to the plaintiff as indorsee of a bill of exchange, but that the bill in fact was not yet due. The defendant was the drawer of the bill, and the drawee had refused to accept it.

BULLER, J. It is settled that, if a bill of exchange is not accepted, an action on the bill will lie immediately against the drawer, although the time of payment is not

The plaintiffs at the trial obtained a verdict, with leave to the defendant to move to set it aside. A rule *nisi* having been accordingly obtained for this purpose,

Erskine and *C. Warren*, who were to have shown cause, were stopped by the court.

Gibbs and *Const*, in support of the rule, endeavored to distinguish this from the case of Milford *v.* Mayor, because of the privity between the original drawer and the person on whom the bill is drawn, who is presumed to be his correspondent, having property of the drawer's in his hands, or at least willing to give him credit; for whose due acceptance thereof the drawer may well be supposed to pledge himself as an inducement for a third person to take his bill instead of payment; there, if the condition fail by the non-acceptance of the drawee, the holder may fairly resort to the drawer immediately. But as between indorser and indorsee there is no such implied understanding, the original contract between them is with relation to the time mentioned in the bill, before which no debt arises.

Lord Ellenborough, C. J. There is no distinguishing the case of an indorser from that of the drawer, it having been long ago decided that every indorser is in the nature of a new drawer, every indorsement as a new bill, and that the indorser stands as to his indorsee in the law-merchant the same as the drawer. The point ruled in Milford *v.* Mayor was not then new. In Bright *v.* Purrier,[1] where the same question occurred, Lord Mansfield said that the law was clearly so settled. Those, indeed, were actions against the drawers; but though this particular case of an action against the indorser has not occurred in the books, yet when it has been laid down that an indorser stands in all respects in the same situation as a drawer, all the consequences follow which are attached to the situation of the latter. And, in a late case tried before me at Guildhall, it appeared to be the universally received law-merchant on the continent that an indorser was liable immediately on the non-acceptance of the drawee.

Grose, J., of the same opinion.

Lawrence, J. In Heylin *v.* Adamson, Lord Mansfield said, when a bill of exchange is indorsed "as between the indorser and indorsee, it

come. This I remember to have been determined in the year 1765, in a cause in which Sir Fletcher Norton was counsel for the defendant (Bright *v.* Purrier, Bull. N. P. 269). The reason is this, as Lord Mansfield said in that case, that what the drawer had undertaken has not been performed, the drawee not having given him the credit which was the ground of the contract. There have been a great many actions of the same sort since that time.

Willes and Ashhurst, JJ., of the same opinion.

Lord Mansfield absent. *The rule discharged."*] — Ed.

[1] Bull. N. P. 269.

is a new bill of exchange, and the indorser stands in the place of the drawer."

LE BLANC, J. There is no hardship on the indorser, for he must be presumed to know the person from whom he receives the bill, and on whose security he must rely. *Rule discharged.*[1]

GANTT v. MACKENZIE.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JULY 23, 1811.

[*Reported in* 3 *Campbell*, 51.]

THIS was an action on a bill of exchange for £1,000, drawn at Barbadoes the 8th of February, 1809, by the defendant, on Scott, Idles, & Co., in London, payable to the plaintiff at sixty days' sight.

The bill was refused acceptance on the 17th April, 1809, and was afterwards presented for payment on the 19th June following, and again dishonored.

The only question was from what period interest was to be calculated.

LORD ELLENBOROUGH left this, upon the custom of merchants, to the gentlemen of the special jury, who said the holder of the bill was entitled to £10 per cent as damages, and that interest was to be allowed only from the time when the bill was presented for payment; and Mr. Waddington, the foreman, observed that he had known it so settled in a case before Mr. Justice Buller.[2] *Verdict accordingly.*[3]

[1] Evans *v.* Gee, 11 Pet. 80; Watson *v.* Loring, 3 Mass. 557; Lenox *v.* Cook, 8 Mass. 460; Renshaw *v.* Triplett, 28 Mo. 213; Lucas *v.* Laden, 28 Mo. 342; Exeter Bank *v.* Gordon, 8 N. H. 66; Mason *v.* Franklin, 3 Johns. 202; Weldon *v.* Buck, 4 Johns. 144; Miller *v.* Hackley, 5 Johns. 375; Bank of Rochester *v.* Gray, 2 Hill, 227, *accord.* — ED.

[2] See Crawford *v.* Branch Bank, 6 Ala. 12, 15. — ED.

[3] But in a case of Harrison *v.* Dickson tried the same sittings, which was an action against the indorser of a bill of exchange drawn upon England from N. S. Wales, the plaintiff did not claim any percentage upon the principal as damages, and was allowed interest from the time the bill was dishonored for non-acceptance.

HOARE AND OTHERS v. GRAHAM AND ANOTHER.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JULY 24, 1811.

[*Reported in* 3 *Campbell*, 57.]

THIS was an action on a promissory note for £4,500, dated 19th October, 1810, made by Gibbon & Boyce, payable to the defendants two months after date, indorsed by them to Grill & Son, who indorsed it to the plaintiffs.

The defence set up was that the note had been drawn as a collateral security for certain advances made by the plaintiffs to Grill & Son; that, at the framing of the note, the defendants refused to indorse it, unless the plaintiffs would agree that it should be renewed when it became due; that the latter acceded to this condition, and that they afterwards demanded payment, instead of calling for a renewal.

LORD ELLENBOROUGH. I don't think I can admit evidence of this sort. What is to become of bills of exchange and promissory notes, if they may be cut down by a secret agreement that they shall not be put in suit? The parol condition is quite inconsistent with the written instrument. This purports to be a promissory note payable two months after date. You say it was not payable at the end of that time; and that, when the two months had expired, the payees, instead of the money, were to have another promissory note. I will receive evidence that the note was indorsed to the plaintiffs as a trust; but the condition for a renewal entirely contradicts the instrument which the defendants have signed. Such an agreement rests in confidence and honor only, and is not an obligation of law. There may, after a bill is drawn, be a binding promise for a valuable consideration to renew it, when due; but, if the promise is contemporaneous with the drawing of the bill, the law will not enforce it. This would be incorporating with a written contract an incongruous parol condition, which is contrary to first principles. There must be a *Verdict for the plaintiffs.*[1]

[1] Dupuy *v.* Gray, Minor, 357, in which case the indorsement was in full; Bank of U. S. *v.* Dunn, 6 Pet. 51; Stubbs *v.* Goodall, 4 Ga. 106; Bartlett *v.* Lee, 33 Ga. 491; Beattie *v.* Browne, 64 Ill. 360; Clayes *v.* White, 65 Ill. 357; Chaddock *v.* Vanness, 35 N. J. 517 (*semble*); Skillen *v.* Richmond, 48 Barb. 428, in which cases the indorsement was in blank; Pollok *v.* Bradbury, 8 Moo. P. C. 227; Hightower *v.* Ivy, 2 Port. 306, in which cases it does not appear whether the indorsements were in full or in blank, *accord.*

Friend *v.* Beebe, 3 Greene, 279 (but see Harrison *v.* McKim, 18 Iowa, 487); Wright *v.* Latham, 3 Murph. 298, cases of special indorsements; Taylor *v.* Scholfield, 2 Cranch, C. C. 315; Stackpole *v.* Arnold, 11 Mass. 32 (*semble*); Barrows *v.* Lane, 5 Vt. 168 (*semble*), cases of blank indorsements; Susquehanna Co. *v.* Evans, 4 Wash. C. C. 480, in which case the form of the indorsement does not appear, *contra.* — ED.

COLLOTT AND OTHERS v. HAIGH.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., NOVEMBER 30, 1812.

[*Reported in* 3 *Campbell*, 281.]

THIS was an action on a bill of exchange, drawn by the defendant upon J. Dufton, accepted by him and indorsed to the plaintiffs.

It appeared that, when the bill became due, the plaintiffs gave time for some weeks to Dufton, upon his lodging some security in their hands, which did not turn out to be available; but it was likewise proved that Dufton had accepted the bill merely for the defendant's accommodation, without any consideration whatsoever.

LORD ELLENBOROUGH ruled that under these circumstances the defendant was not discharged by the time given to the acceptor. The drawer of an accommodation bill must be considered as the principal debtor, and the acceptor only in the light of a surety. The reason why notice of the dishonor of a bill must in general be given to the drawer is that he may recoup himself by withdrawing his effects from the hands of the acceptor; and he is discharged by time being given to the acceptor without his consent, because his remedy over against the acceptor may thus be materially affected. But, where the bill is accepted merely for the accommodation of the drawer, he has no effects to withdraw, and no remedy to pursue when compelled to pay. He therefore suffers no injury either by want of notice, or by time being given to the acceptor; and in an action on the bill he cannot defend himself upon either of these grounds. *Verdict for the plaintiff.*[1]

[1] Hill *v.* Read, 6 D. & Ry. N. P. 26 (*semble*); Sargent *v.* Appleton, 6 Mass. 85, *accord*.

In Hill *v.* Read, *supra*, Abbott, C. J., said, p. 26: "The exception as to accommodation bills extends only to cases where the action is brought against the party for whose accommodation the bill was made; and therefore in an action against the drawer of a bill of exchange, which was drawn for the accommodation of the acceptor, it is a good defence to prove that time was given to the acceptor, without the assent of the drawer."

So also the holder will not release a drawer or indorser by releasing or giving time to the acceptor or maker if the drawer or indorser has himself released the acceptor or maker. Gloucester Bank *v.* Worcester, 10 Pick. 528; Ludwig *v.* Iglehart, 43 Md. 89; Bruen *v.* Marquand, 17 Johns. 58. — ED.

WALKER *v.* BARNES.

In the Common Pleas, November 21, 1813.

[*Reported in* 5 *Taunton*, 240.]

This was an action upon a bill of exchange, dated the 8th of May, 1812, drawn by the defendant upon Spence, at a month's date, payable to the defendant's order for £10, accepted by the drawee, and dishonored by him when payable, and presented for payment. The defendant pleaded *non assumpsit* as to all except £10; and, as to that, that he was at all times, after making his promise, ready and willing to pay the £10, and that he tendered that sum to the plaintiff on the 11th of June, 1812, being the day when the bill became payable. The plaintiff in his replication joined issue on the *non assumpsit*, and traversed the tender in manner and form alleged. Upon the trial of the cause at the Westminster sittings, after Trinity term, 1813, before Mansfield, C. J., it appeared that on the 11th of June the bill was presented for payment by the holder of it, who resided in Charles Street, Middlesex Hospital, and who on the 12th wrote a letter, and put it into the two-penny post-office, where it was marked with the postmark of four in the afternoon, apprising the defendant of the non-payment, and that the bill lay with the holder. About eleven o'clock on the morning of the 13th, the defendant tendered £10, which was refused. For the plaintiff, it was objected that the tender did not cover the whole demand, inasmuch as damages were due for the interest of the note during the detention of the debt from the 11th to the 13th, and that the plaintiff was therefore entitled to a verdict on the issue of *non assumpsit*, for which was cited the case of Hume *v.* Peploe;[1] and Mansfield, C. J., reserved the point, subject whereto the jury found a verdict for the defendant on both issues, with liberty to move to enter a verdict with nominal damages for the plaintiff.

Best, Serjt., in this term had accordingly obtained a rule *nisi*, against which

Shepherd, Serjt., now showed cause. He urged that there was no distinction between this case and the case of goods sold, wherein, although there was an existing debt from the moment of delivery, yet a reasonable time was given for payment; and it was no answer to a tender of the price to show that it was not made on the day the debt accrued. The holder of a bill has a right to arrest the acceptor with-

[1] 8 East, 168.

out any presentment to him; but it could not therefore be said that a tender by the acceptor on the following day was evidence that he was not always ready to pay. Until the drawer receives from the holder notice of the dishonor of the bill by the acceptor, the drawer's obligation to pay does not commence. The notice was not given till the 12th, and at eleven o'clock on the morning of the 13th the defendant made the tender, which was an exercise of all reasonable diligence. The case of Hume *v.* Peploe[1] was decided on the defective form of pleading the tender; namely, that the defendant was ready to pay from the time of making the tender. Here the defendant avers that he was always ready to pay, and that at a certain time before the action he offered to pay, and no previous demand and refusal were proved, which would have disaffirmed the continual readiness; nor had the plaintiff controverted that allegation, and the jury had properly found the verdict for the defendant: if the plaintiff contended that a tender made after the day was not a sufficient bar, he ought to have demurred to the plea.

Best, Serjt., in support of his rule, urged that the drawer of a bill was a guarantee for the acceptor, as such he contracted that the acceptor should perform his contract, or otherwise that he, the drawer, would be answerable for all damage sustained by reason of the acceptor's non-performance. That damage commenced as soon as the acceptor had failed to fulfil his contract; and the drawer did not discharge his guaranty, unless he paid the holder as well the amount of the bill as all damages that had been sustained by reason of the detention; and although the drawer could not be sued until notice of the dishonor, yet, immediately after notice, he became liable to make good *ab initio* the acceptor's breach of contract. The plea of tender could not be demurred to: it only professed to cover £10 of the demand; and, as to £10, it might be good, but the plaintiff was entitled to a further sum as unliquidated damages, to which a tender neither could be nor had been pleaded, but to which demand the defendant had pleaded the general issue, and upon that issue something remained to be recovered, and the plaintiff, and not the defendant, was therefore entitled to the verdict. The verdict, too, as it respected the tender, was against evidence; for the tender was averred to be made on the 11th, and the proof was of a tender on the 13th. The *videlicet* under which the allegation was made would not cure the variance, since the averment was material. If the tender had, in truth, been made on the 11th, it would have been a bar to the action, because on that day no interest had accrued; but a tender on no subsequent day would have the same

[1] 8 East, 168.

effect, because on every subsequent day interest had accrued; although the damages in the present case were less than a halfpenny, yet if the bill had been for many thousand pounds, and the interval which elapsed before notice reached the drawer had been of many months' continuance, which might easily happen in the case of foreign bills, the damages would have been a considerable sum; and the same principle must govern the one case and the other. This was not like the case of goods sold, which do not bear interest, because the law intends a reasonable time for payment of them: it was more like the case of a bond upon which *solvit post diem* was no plea, until it was given by statute. If the defendant's argument is right, the defendant would, in all actions on bills of exchange, be entitled to deduct from the verdict the amount of interest between the day whereon bills became due and the day when the first notice is given of the dishonor to the drawer; but that is contrary to universal practice, and never yet was contended for.

MANSFIELD, C. J. The case has been well argued, but the plaintiff is not entitled to a verdict. If the acceptor does not pay the bill when it is due, the drawer cannot find out by inspiration who is the holder; and, till he finds out that, he cannot pay the bill. When he has found out who is the holder, he is bound to pay the bill within a reasonable time: if he does not, he is liable to damages for not performing his contract, those damages are the interest on the bill. The drawer has notice of the dishonor on the 12th: on the morning of the 13th, he tenders the money. Is not this all that a man can reasonably be required to do? Is it not all that he undertook to do? The verdict is right.

HEATH, J, I am of the same opinion. It would occasion many mischievous actions, if it were otherwise.

DALLAS, J. It seems to me that there is no unjust detention of the debt for which any damages ought to have been given: the drawer has done all he could; he was not bound to pay except from the time of the notice given; he has done, therefore, all that he was bound to do, and was entitled to a verdict.[1] *Rule discharged.*[2]

[1] Chambre, J., was absent.

City Bank *v.* Cutter, 3 Pick. 414, *contra.*

[2] In Ackermann *v.* Ehrensperger, 16 M. & W. 99, the guarantor of a bill was held liable for interest from the time of the acceptor's default. Pollock, C. B., remarking (p. 103): "With respect to the defendant's liability for interest, I entertain no doubt that a party who guarantees the payment of a bill is liable for all that the principal would be liable for; . . . and, as the acceptor would not have duly paid the bill, unless he had paid both principal and interest, the same consequences must apply as to the guarantor for the acceptor: it cannot mean one thing to the principal, and another as to the surety." — ED.

LE FEVRE *v.* LLOYD, ADMINISTRATOR OF LLOYD, DECEASED.

IN THE COMMON PLEAS, NOVEMBER 10, 1814.

[*Reported in 5 Taunton*, 749.]

THE plaintiff declared upon a bill of exchange, drawn by the deceased upon John Kennion, in favor of the plaintiff, at two months after date, which had been dishonored by the drawee. The cause was tried at the London sittings after Trinity term, 1814, before Gibbs, C. J., when the case was that the plaintiff, who resided at Southampton, had applied to Maitland & Coles in London, to sell some cotton for him, who said they could obtain 20*d.* per pound for it, if it corresponded with the sample. The plaintiff wrote that his friends accepted of the offer, and Maitland & Co. replied that the party would take the cotton at 20*d.* per pound, to be paid for in a bill of two months from the time of their arrival at Brandon's warehouse, London, subject, of course, to commission and brokerage; but, on objection made, afterwards consented to forego their commission. The plaintiff accepted these terms. Maitland & Co. had employed the deceased as a broker to sell the cotton. He having, on the arrival of the goods in London, ascertained the amount of the price, drew the bill in question on the purchaser for the sum, and delivered it to Maitland & Co., who remitted it to the plaintiff. The defence was that the defendant, having drawn the bill only as agent for the plaintiff, and without any consideration for so doing, but merely for the purpose of facilitating business, the plaintiff, not being himself then in London, the defendant was not liable on the bill to the plaintiff, his own principal; and that the meaning of paying for goods by a bill at two months was that the seller should draw a bill on the buyer; and the broker here drew as the servant of the seller. Gibbs, C. J., thought it was imprudent in Lloyd to put his name on the bill, but that, he having so done, all the legal consequences of the act attached on him as much as on any other party whose name was thereon, and the jury found a verdict for the plaintiff.

Shepherd, Solicitor-General, in this term moved, upon the ground taken at the trial, to set aside the verdict and enter a nonsuit.

Per Curiam. The broker, by giving this bill, put an end to all doubt as to the buyer's responsibility. The vendors, upon receiving it, in consequence of their good opinion of Lloyd, dismiss from their minds all care about the solvency of the purchaser.

Rule refused.[1]

[1] It should be noticed that the defendant in this case did not attempt to substitute a different contract from that implied by the drawing of the bill, but to show that

GOUPY AND ANOTHER v. HARDEN AND OTHERS.

IN THE COMMON PLEAS, NOVEMBER 11, 1816.

[*Reported in* 7 *Taunton*, 159.]

THIS was an action brought against the defendant as indorsers of two bills of exchange, for £400 and £600, drawn on the 12th May, 1815, by De Franca & Co. upon Gould, Brothers, & Co., merchants at Lisbon, at thirty days after sight, payable to the defendants, and by them indorsed to the plaintiffs, who were merchants at Paris, and who indorsed the bills to Ricci & Son, merchants at Genoa, who also negotiated the bills. The bills were presented to Goulds for acceptance, on the 22d August in the same year, when they were refused, and protested for non-acceptance; but were accepted by Montano, under protest, for the honor of Ricci & Co. The bills were again on 20th September, when due, presented to Goulds for payment, which was also refused, and a protest made, and Montano paid them for the credit of Ricci & Co., whereby the plaintiffs were obliged to pay the amount of the bills, with costs, charges, interest, exchange, and re-exchange. Upon the trial of this cause, at the sittings in London after Trinity term, 1816, before Gibbs, C. J., it appeared that the plaintiffs had employed the defendants, who were merchants in London, for a commission of one half per cent, to procure in London and transmit to them to Paris bills on Portugal for £1,000. The defendants accordingly purchased upon the exchange the bills in question, and, having specially indorsed them to the plaintiffs, transmitted them to Paris: the plaintiffs indorsed them to Ricci & Sons, merchants at Genoa, who further negotiated them. On the 15th of July, De Franca failed. Goulds had paid bills drawn on them so late as the 30th of June, 1815. On the 12th of October, the plaintiffs by letter apprised the defendants of

there was in fact no contract whatever between himself and the plaintiff. In Jones *v.* Lathrop, 44 Ga. 398, under similar circumstances, the drawer was held not to be liable to his principal.

These cases are obviously distinguishable from the following authorities, in which evidence which tended to prove a different contract from that imported by the drawing was rightly excluded: Abrey *v.* Crux, L. R. 5 C. P. 37; Druiff *v.* Parker, L. R. 5 Eq. 131; Brown *v.* Wiley, 20 How. 442; Howes *v.* Austin, 35 Ill. 396; Pack *v.* Thomas, 21 Miss. 11; Hill *v.* Gaw, 4 Barr, 498; Rockmore *v.* Davenport, 14 Tex. 602. Robertson *v.* Nott, 2 Mart. N. S. 122, *contra*, is not to be supported.

This distinction beween evidence which varies the terms of a contract, and evidence which shows the non-existence of a contract, is of course not confined to bills and notes. Rogers *v.* Hadley, 2 H. & C. 227; Pym *v.* Campbell, 6 E. & B. 370; Clever *v.* Kirkman, 24 W. R. 159; Grierson *v.* Mason, 60 N. Y. 394. — ED.

the dishonor of the bills, and in a subsequent letter stated that they should certainly have sooner sent forward the bills for acceptance, had they not relied on the defendants' guaranty. The defendants contended, first, that they, having indorsed these bills to the plaintiffs only as their agents, were not liable on that indorsement. Evidence was given that, when agents indorse foreign bills for the mere purpose of transmitting them without intending to incur responsibility for the payment, it is their practice to add to the indorsement the words *sans recours*, that these words however, implying a doubt in the mind of the indorser of the stability of some of the parties, injure the credit of the bills, and therefore are usually omitted, if a confidence exists between the parties, although it is nevertheless intended that the agent should not be responsible for the goodness of the bills; and the defendants contended that such was the course of dealing in the present instance, as evinced by the low rate of commission which the defendants were to receive. The defendants also contended that they were discharged by laches, for that the bills ought to have been sooner presented to the drawee for acceptance, and not sent round from Paris to Italy, by which the presentment for acceptance, and consequently the period of payment, had been many months delayed; and, if the bills had been presented for acceptance in the beginning of June, they would have been payable before Goulds ceased to honor the drawers' demands, and before the drawers themselves had become insolvent. The jury, however, found a verdict for the plaintiffs: which

Lens, Serjt., now moved to set aside, on the grounds, first, that an agent, under these circumstances, was not liable upon his indorsement; next, that the presentment of a bill payable at or a certain time after sight could not be protracted to an indefinite or unreasonable period, without discharging the parties.

GIBBS, C. J. This is an action brought against the indorser of two bills at thirty days' sight, and the verdict is for the plaintiffs. Objections are made to their right to recover on two grounds: first, that, though the bills were indorsed by the defendants, the defendant, under the circumstances, is not liable on his indorsement; secondly, that there has been laches in not presenting the bills for acceptance within a shorter time. As to the first objection, here is an unqualified indorsement. It is not proved that the plaintiffs knew that the defendants were [not][1] connected with the bill otherwise than as agents; but, if they had known it, and I will take it in the strongest way, that they knew the defendants were acting only as agents, still they had a right to consider that in this transaction the defendants were liable as indorsers; and they may justly say, as they have done, "we should have sent for-

[1] See 10 Moo. P. C. 116, n. (*a*). — ED.

ward these bills for acceptance, unless we had seen your names on them, which placed the respectability of the bills beyond a question, otherwise we should have sought the security of the drawee."[1]

DALLAS, J. The defendants might have specially indorsed this bill *sans recours*, if they had thought fit so to do, but they have not done it.

The rest of the court concurred in refusing the application.[2]

FREE AND OTHERS v. HAWKINS.

AT NISI PRIUS, CORAM GIBBS, C. J., JULY 10, 1816.

[*Reported in Holt, Nisi Prius Cases*, 550.]

ACTION by indorsee against the payee of a promissory note, of which Sir Robert Salisbury was the maker, and the defendant became the payee and indorser, as surety for Sir R. S. to the plaintiffs.

The only evidence of the making of the note by Sir R. S. was by proving the indorsement of the note by the defendant, which was objected to by *Lens*, Serjt. But

GIBBS, C. J., ruled, from the analogy of a bill of exchange, where the acceptance is an admission of the handwriting of the drawer, that the indorsement by the payee is an admission of the handwriting of the maker.

The note was not paid when due by Sir R. S., and no notice had been given to the defendant; but evidence was called to prove that the defendant was merely a surety, and that, as between him and Sir R. S., there was no consideration. Evidence was likewise tendered to prove that it was agreed between all the parties that the note should not be put in suit till certain estates of Sir R. S. were sold; and it was insisted by *Best*, Serjt., on the authority of De Berdt *v.* Atkinson[3] and Sisson *v.* Tomlinson,[4] that where there is no consideration as between the maker and the payee, no notice of non-payment by the maker is necessary in order to charge the payee, in the same way as no notice is necessary to be given to the drawer of a bill of exchange who has no effects in the hands of the acceptor. But

GIBBS, C. J., adverting to the cases of Smith *v.* Becket[5] and Brown *v.* Massey,[6] ruled that the analogy contended for did not exist; and

[1] The remainder of the opinion in which his lordship held that laches was not imputable to the plaintiffs has been omitted. — ED.

[2] Woodward *v.* Foster, 13 Grat. 200, *accord*. — ED.

[3] 2 H. Black. 336.

[4] 1 Selw. N. P. 357, n.

[5] 13 East, 187.

[6] 15 East, 216.

that the payee and indorser was, under the circumstances, entitled to notice; and he rejected the evidence offered, that there was an understanding that the note should not be put in suit, in order to excuse the want of notice, — observing that, as such an understanding could not have been given in evidence to prevent the plaintiff from suing on the note, so it ought not to be received to excuse the want of notice.[1]

PHILPOTT v. J. W. BRYANT.

AT NISI PRIUS, CORAM PARK, J., NOVEMBER 30, 1827.

[*Reported in* 3 *Carrington & Payne*, 244.]

ASSUMPSIT on a bill of exchange, dated the 16th of September, 1822, at six months after date, drawn by the defendant on his father John Bryant, and accepted by him payable at No. 18 Bishopsgate Street. The plaintiff was the holder. The declaration stated that the bill was in due manner presented to the drawee for payment.

A notary's clerk proved that he presented the bill for payment, at No. 18 Bishopsgate Street; and it appeared that John Bryant, the drawee, died about a fortnight before the bill became due, leaving his widow his executrix.

[1] *Best*, Serjt., obtained a rule *nisi* for a new trial, but the court discharged the rule. Free v. Hawkins, 8 Taunt. 92; Anderson v. Yell, 15 Ark. 9; Goldman v. Davis, 28 Cal. 256; Bowers v. Headen, 4 Ind. 318; Barry v. Morse, 3 N. H. 132; Bank of Albion v. Smith, 27 Barb. 489 (in which cases the indorsement was in blank); Hightown v. Ivy, 2 Port. 308 (in which case the form of the indorsement does not appear). *accord*.

Fuller v. McDonald, 8 Greenl. 218; Sanborn v. Southard, 25 Me. 409; Fullerton v. Rundlett, 27 Me. 31; Patterson v. Todd, 18 Pa. 426, 434 (*semble*); Newell v. Williams, 5 Sneed, 208 (*semble*); Kimbroe v. Lamb, 3 Humph. 17; 4 Humph. 95, s. c. (in which cases the indorsement was in blank); Lane v. Stewart, 20 Me. 98 (in which case the indorsement was in full); Boyd v. Cleveland, 4 Pick. 525; Taunton Bank v. Richardson, 5 Pick. 436 (in which cases the form of the indorser does not appear), *contra*.

In the Maine and Massachusetts cases above cited, the courts proceeded upon the unfounded assumption that the evidence offered did not vary the contract of the indorser, but merely showed the waiver of performance of a condition, an assumption which was emphatically repudiated in Smith v. Morrill 54 Me. 48, 51, 53.

There would seem to be a similar fallacy in the reasoning by which it has been held that evidence is admissible to show that the parties intended that presentment for payment should be made at a place not mentioned in the bill or note. See Brent v. Bank of Metropolis, 1 Pet. 89; State Bank v. Hurd, 12 Mass. 172; Meyer v. Hibscher, 47 N. Y. 265; Barclay v. Weaver, 19 Pa. 396, which, however, were probably all cases of blank indorsements. — ED.

Curwood, for the defendant, objected that the plaintiff could not recover, as he had merely averred and proved presentment to the drawee for payment. To make the drawer liable, there must be default on the part of the acceptor; and, if the drawee has not been required to accept, he cannot be guilty of default in neglecting to pay.

PARK, J. I am clearly of opinion that what has been done is sufficient. I should destroy half the trade of the city of London, if I were to hold that bills made payable so many days after date must be presented for acceptance as well as for payment.[1] If they are made payable after sight, it will be otherwise.[2]

Curwood then submitted that, the drawee being dead before the bill became due, the plaintiff was bound to prove presentment at the house of the executrix, because she might not be conusant of the existence of any such bill.

PARK, J. No. I think not. It is presented where it is made payable, and I am of opinion that that is sufficient.[3]

Verdict for the plaintiff, subject to a motion on another point.

[1] Tanner v. Bean, 4 B. & C. 312; Orr v. Maginnis, 7 East, 362 (*semble*); Washington Bank v. Triplett, 1 Pet. 25; Townsley v. Sumrall, 2 Pet. 170; Davies v. Byrne, 10 Ga. 329; Smith v. Roach, 7 B. Mon. 17; Comm. Bank v. Perry, 10 Rob. (La.) 61; Fall River Bank v. Willard, 5 Met. 216; Rice v. Wesson, 11 Met. 408; Oxford Bank v. Davis, 4 Cush. 188; Carmichael v. Pa. Bank, 5 Miss. 567; Glasgow v. Copeland, 8 Mo. 268; Walker v. Stetson, 19 Oh. St. 400; Bank of Bennington v. Raymond, 12 Vt. 401, *accord*.

See Allen v. Suydam, 17 Wend. 368; 20 Wend. 321, s. c.

[2] "There is as little doubt that it is now much too late to contend that the law does not require a presentment for acceptance of a foreign or other bill of exchange, payable at, or a certain time after, sight. How otherwise can the time the bill has to run be fixed, where it is payable after sight? Indeed, the statute of 3d & 4th Anne, c. 9, § 7, makes an inland bill of exchange, received in satisfaction of a debt, a full and complete payment, if the holder does not take his due course to obtain payment thereof, by endeavoring to get the same accepted and paid, and therefore in some cases, undoubtedly, it requires the presentment for acceptance; and, as the law has been long settled that the holder of a bill payable after date is not obliged to present it for acceptance, it must apply to bills payable on or after sight." Ramchurn Mullick v. Luchmeekund Radakissen, 9 Moo. P. C. 65, *per* Parke, B. — ED.

[3] De Bergareche v. Pillin, 3 Bing. 476; Hawkey v. Borwick, 4 Bing. 135; Evans v. St. John, 9 Port. 186; Eason v. Isbell, 42 Ala. 456; Gale v. Kemper, 10 La. 205; Woodbridge v. Brigham, 13 Mass. 556; Lawrence v. Dobyns, 30 Mo. 196; Troy Bank v. Grant, Hill & D. 119; Hunt v. Maybee, 8 Seld. 266; Etheridge v. Hadd, 44 Barb. 69; Merchants' Bank v. Elderkin, 25 N. Y. 178; Rahm v. Phil. Bank, 1 Rawle, 335; Jenks v. Doylstown Bank, 4 W. & S. 505; Carter v. Union Bank, 7 Humph. 548; Worley v. Waldran, 3 Sneed, 548, *accord*. — ED.

PIKE v. STREET.

AT NISI PRIUS, CORAM LORD TENTERDEN, C. J., OCTOBER 29, 1828.

[*Reported in Moody & Malkin*, 226.]

THIS was an action by an indorsee against the drawer and indorser of a bill of exchange.

The defence was, that though the plaintiff had given full value for the bill to Street, the defendant, yet it was under an agreement that he should sue Miles the acceptor of the bill only, and should not sue the defendant as indorser.[1] The agent of the defendant, who negotiated the bill with the plaintiff, said that the plaintiff took it under a verbal agreement to that effect. It was contended for the plaintiff that such an agreement was invalid, and contrary to the nature of a transfer by an indorsement, which was general and unqualified.

LORD TENTERDEN, C. J., in summing up, left it to the jury to say whether or no the plaintiff took the bill on the terms and conditions that he should have recourse to Miles, and him only, and not sue Street at all; if so, they should find for the defendant, such an agreement being a good bar to the action; if they did not believe that, then their verdict should be for the plaintiff. *Verdict for the plaintiff.*[2]

[1] Or as drawer. See Dans. & Ll. 159, s. c. — ED.

[2] Downer v. Chesebrough, 36 Conn. 39; Dale v. Gear, 39 Conn. 89 (but see Dale v. Gear, 38 Conn. 15, *contra*); Butler v. Suddeth, 6 Monr. 541; Stapler v. Burns, 43 Ga. 382 (but see Clayton v. Bussey, 30 Ga. 946; and Meador v. Dollar Sav. Bank, 56 Ga. 605, *contra*); Harrison v. McKim, 18 Iowa, 485 (but see Sands v. Wood, 1 Iowa, 263; and Sherman v. Eldon, 12 Iowa, 438, *contra*); Patten v. Pearson, 55 Me. 39; 57 Me. 428, s. c. (overruling Crocker v. Getchell, 23 Me. 392; and Goodwin v. Davenport, 47 Me. 112); Mehelm v. Barnet, Coxe, 86 (*semble*); Johnson v. Martinus, 4 Halst. 144 (but see Chaddock v. Vanness, 35 N. J. 517 (*semble*), *contra*); Mott v. Hicks, 1 Cow. 513, 537 (*semble*); Bruce v. Wright, 8 Hun, 548; 5 Th. & C. 81, s. c.; Cummings v. Fisher, Anth. N. P. 1; Mendenhall v. Davis, 72 N. Ca. 150; Hill v. Ely, 5 S. & R. 363; Patterson v. Todd, 18 Pa. 426; Bircleback v. Wilkins, 22 Pa. 26; Rice v. Ragland, 10 Humph. 545 (*semble*); Rhodes v. Risley, N. Chip. 84, *accord*.

Moses v. Macpherlan, 1 W. Bl. 219; 2 Burr. 1005, s. c.; Mason v. Burton, 54 Ill. 349; Odam v. Beard, 1 Blackf. 191; Wilson v. Black, 6 Blackf. 509; Campbell v Robbins, 29 Ind. 271; Lee v. Pile, 37 Ind. 107; Holton v. McCormick, 45 Ind. 411; Charles v. Denis, 42 Wis. 56 (overruling Murdock v. Arndt, 1 Pinn. 70); Eaton v. McMahon, 42 Wis. 484, *contra*.

See Foster v. Jolly, 1 C. M. & R. 703; Davis v. Brown, 94 U. S. 423; Wade v Wade, 36 Tex. 529. — ED.

SIGGERS v. LEWIS.

IN THE EXCHEQUER, JUNE 4, 1834.

[*Reported in* 3 *Law Journal Reports, New Series, Exchequer*, 312.[1]]

ASSUMPSIT against the indorser of a bill of exchange.

Plea: that the action was commenced before a reasonable time had elapsed for the defendant to pay the bill, after notice to him of non-payment.

Demurrer and joinder therein.

Mansel was to have argued in support of the demurrer, but the court called on

Chandless to support the plea. He cited Walker *v.* Barnes as an authority that the defendant was bound to pay the bill only in a reasonable time after notice of dishonor, and that no cause of action arose until such time had elapsed. Wherever there was an implied contract, the law allowed a reasonable time for its performance. In Hume *v.* Peplow,[2] the acceptor was held liable, though he tendered the amount of the bill the day after it became payable; but Walker *v.* Barnes was an authority that the holder could not recover even nominal damages against the drawer, if he tendered within a reasonable time. The reasons used by Mansfield, C. J., with regard to the drawer in that case were equally applicable to the indorser.

LORD LYNDHURST, C. B. In Walker *v.* Barnes, there appears to have been a sort of compromise, as the Chief Justice says that no jury would have given a farthing damages. The contract of the drawer is that the acceptor shall pay the bill, and, until notice of the acceptor's default is given to the drawer, no action can be maintained against him. If, upon notice being given, the money is not paid, the action is maintainable immediately. That moment the cause of action arises; and if the action is improperly brought, notwithstanding a tender of the money, the course is to apply to a judge to stay the proceedings.

ALDERSON, B. According to the argument in support of the plea, every declaration against the indorser of a bill of exchange ought to allege that a reasonable time had elapsed. But nobody ever heard of a declaration containing such an averment. The truth is that the not paying in a reasonable time after notice is not the cause of action, but the cause of action is the non-payment on request. Walker *v.* Barnes amounts to this: that, if there was a defence arising within a reasonable time after notice of dishonor, it might perhaps be pleaded, with

[1] 1 C. M. & R. 370, s. c. — ED.

[2] 8 East, 168.

an averment of its having arisen within such reasonable time. Supposing that is a decision which can be supported, the defendant might perhaps have been within the principle of that case, if he had pleaded a tender or payment within a reasonable time after notice of dishonor.

GURNEY, B. After notice of dishonor to the drawer, he is bound to pay on demand. The proposition as to a reasonable time is not to be found anywhere but in Walker v. Barnes.

Judgment for the plaintiff.

ROTHSCHILD AND OTHERS v. CURRIE.

IN THE QUEEN'S BENCH, JANUARY 12, 1841.

[*Reported in* 1 *Queen's Bench Reports*, 43.]

ASSUMPSIT by indorsee against indorser of a bill of exchange for 12,000 francs, dated 31st January, 1837, drawn by Segnette on, and accepted by, Messrs. Boisdon & Kernel, payable at Paris, three months after date, to defendant, and by him indorsed to plaintiffs. Averment of non-payment by the acceptors, and of protest and due notice thereof to defendant. Plea: that defendant had not due notice *modo et forma*, &c. Issue thereon.

On the trial before Lord Denman, C. J., at the London sittings after Trinity term, 1838, it appeared that the plaintiffs were bankers of London, where the defendant and the drawer were also resident. The acceptors carried on business at Paris.

The 30th April, 1837, when the bill became due according to the law of France, fell on Sunday, and it was therefore presented for payment on Saturday, the 29th April, and was dishonored. On Monday, 1st May, the bill was protested. By the law of France, the protest must be registered (Code de Commerce, Art. 176); but, Monday being a holiday (the Fête du Roi), the office for registration was closed on that day before the notary, or *huissier*, could register it.

On Tuesday, 2d May, the protest was left for registration with the proper officer; but, in consequence of the pressure of business, it was not registered or returned until it was too late to remit it by post to London on that day. On Wednesday, 3d May, the bill and protest were remitted to London, where they were received by the plaintiffs on Friday, 5th May; and notice was thereupon, without delay, and on the same day, given by them to the defendant.

Evidence was given that registration is required by the French law under a penalty; that the registrar may detain the protest for that purpose; and that fifteen days are allowed by that law for giving notice of dishonor, even where both parties are resident in France.

Some evidence was also offered by the defendant of a custom to give notice of dishonor to English correspondents by letter from Paris, without transmitting the protest or waiting for registration; but the evidence was not satisfactory; and the *huissier*, or notary, who registered the bill, deposed that he could not lawfully transmit a duplicate of the protest until it had been registered. It also appeared that the acceptors had become insolvent two months before the bill became due.

His lordship stated his opinion to the jury, that the notice of dishonor should be governed by the French law; and the jury, by his direction, found a verdict for the plaintiffs.

In the following term, Sir *F. Pollock* obtained a rule *nisi* to enter a nonsuit, in pursuance of leave reserved at the trial. In Hilary vacation, 1840,[1]

Sir *John Campbell*, *Attorney-General*, *Kelly*, and *Petersdorff* showed cause, contending that, by the French law, no notice could be effectual without protest and registration (Code de Commerce, Art. 165, 175, 176);[2] that, by that law, it appeared that fifteen days at least were allowed for giving the notice; but that, at all events, it was enough that due diligence had been used in taking the steps necessary for sending effective notice; and that, in this case, no laches whatever could be attributed to the plaintiff, Darbyshire *v.* Parker,[3] Firth *v.* Thrush;[4] that, even if the notice should be regulated by English law, it was given in time, supposing the days of grace allowed by the English law to be included; but that here the law of France, which was the *lex loci solutionis*, was that which ought to prevail; for that the notice was not merely an incident or condition precedent to the right of action or other legal remedy on the bill, but was parcel of the contract itself, which was a foreign one. On this point, the following authorities were cited: Robinson *v.* Bland,[5] Trimbey *v.* Vignier, Huber *v.* Steiner,[6] De la Vega *v.* Vianna,[7] Dues *v.* Smith,[8] Anstruther *v.*

[1] Tuesday, February 4th. Before Lord Denman, C. J., Littledale, Williams, and Coleridge, JJ.

[2] The form of notification, given in the formularies attached to some editions of the Code, recites the registration. See Rogron, Formulaire du C. de Commerce, No. 50.

[3] 6 East, 3.

[4] 3 B. & C. 387.

[5] 2 Burr. 1077.

[6] 2 New Ca. 202.

[7] 1 B. & Ad. 284.

[8] Jacob, 544.

Adair,[1] Don v. Lippman;[2] Pothier, Traité du Contrat de Change, no. 155; Story, Conflict of Laws, c. 8, §§ 314, 347.[3]

Sir *F. Pollock* and *Hoggins*, contra, contended that, as between an English indorser and indorsee, the bill was to be taken as one drawn by the defendant in England, and negotiated there; and the notice should be such as the English law requires. That though the Code de Commerce may require registration under a penalty, it did not follow that notice of dishonor and of protest might not be legally given before registration. It may be true that the act done in each country should conform with the laws of that country; but here the notice was to be given in England, and should therefore be an English notice, whatever formalities the law of France might require to give the holder a legal remedy in that country. Indeed, art. 165 of the Code seems rather to prescribe the period of fifteen days to the citation or suit, than to the notification of protest: "Il doit faire notifier le protêt, et, à défaut de remboursement, le faire citer en jugement dans les quinze jours qui suivent la date du protêt," &c. If the French law should be held to govern, the plaintiff would be obliged to sue the defendant within fifteen days, which is absurd, and repugnant to the rule laid down in De la Vega v. Vianna,[4] and stated by Tindal, C. J., in Trimbey v. Vignier; namely, that in seeking to enforce a contract in this country, the law of the forum, and not of the contract, must prevail.

Cur. adv. vult.

On this day[5] the judgment of the court was delivered by

Lord Denman, C. J. This was an action on a bill of exchange drawn in England, in favor of the defendant, on a house in Paris, and payable there. The defendant indorsed it to the plaintiff, both being domiciled in England. The plaintiff remitted it to Paris to be presented for payment. The bill was at three months, which expired on the 30th April. No days of grace being allowed by the French law, and that day being on a Sunday, the bill by the same law became due on the 29th, on which day it was presented and dishonored. By the French law, the bill was to be protested on the day following the dishonor; and, by the 176th section of the Code de Commerce, the notary, or *huissier*, making the protest, is bound under certain penalties to leave an exact copy of the protest, and inscribe it at length in a register kept at a public office for that purpose. The 1st May, on which the protest and registration were to take place, was the Fête

[1] 2 M. & K. 513. [2] 2 Shaw & M'L. 682; s. c. 5 Cl. & Fin. 1.

[3] Boston, 1834. See also 3 Burge's Commentaries on Colonial and Foreign Laws, 749, &c., part 2, c. 20.

[4] 1 B. & Ad. 284. [5] Tuesday, January 12th, 1841

du Roi, and the office was therefore closed at twelve. In consequence of this and the pressure on the office by the accumulated business on the 2d, the notary was unable to complete the registration until after post time on the 2d. Notice of dishonor was sent by the post on the 3d, and reached the defendant on the 5th, the same day on which it would have reached him, if days of grace had been allowed and notice had been sent immediately. The question in the cause is whether, under these circumstances, the notice of dishonor was in time.

It was, in the first place, left to the court to decide whether, upon the assumption that it was necessary by the French law to complete the registration before notice could be effectually given, due diligence had, in fact, been used; and upon this point our opinion would be in favor of the plaintiff. It appears to us that the delay was attributable to circumstances over which the notary had no control, and therefore was satisfactorily accounted for.

In the course of the argument, it was almost assumed on the one hand, and not very strongly denied on the other, that it was necessary by the French law to register the protest before notice of the dishonor could be regularly given. On this point, we do not intend to express any opinion, because, in our view of the case, it is not necessary to its decision; and we should be cautious not to pronounce any judgment upon a point of foreign law not brought before us. We will only say, in passing, that it depends on the 176th section of the same Code, and that, as we read it, there is nothing which satisfies us of any necessary connection between the notice and the registration.

Still, although the delay in question was occasioned by the difficulty of registration, the plaintiff will not be the less entitled to our judgment in his favor, if he can establish two things: that he gave his notice in due time according to the French law; and that the French law is to govern the decision of the case. And these are really the points on which the case turns.

The first of these depends on the 165th section of the Code, which, being appealed to on both sides, we are at liberty, and indeed are compelled, to examine and form our judgment upon, as was done by the Court of Common Pleas in Trimbey *v.* Vignier. The language of the section does not make it immediately clear whether the period of time there specified applies both to the notification of the dishonor and the usual citation in default of payment, or only to the latter. The words are: "Il doit lui faire notifier le protêt, et à défaut de remboursement le faire citer en jugement dans les quinze jours qui suivent la date du protêt, si celui ci reside," &c. But, as no other distinct limit of time is given within which the notice must be given, it seems to us, upon the whole, that the fifteen days, and the other proportional allow-

ances of time which follow, apply to the notice, as well as to the formal citation. The former must be done so much within the period as to allow time for the doing of the latter also, in case of non-payment before it expires.

The second point was admitted properly to depend on this, whether the notification of the dishonor be parcel of the contract, or only an incident to the remedy at law for the breach of it. If it be the former, the *lex loci contractus* will prevail; if the latter, the *lex loci fori* in which the remedy is sought. And this bill, being payable in France, is a foreign bill; and, although actually made in England, must be taken, as between the drawer and payee, to have been made in France, according to the principle embodied in the civil law maxim: "Contraxisse unusquisque in eo loco intelligitur in quo, ut solverit, se obligavit." Dig. lib. 14, tit. 8, p. 21. And, if this be so as between the drawer and payee, it is equally true as between the indorser and the indorsee, the former of whom must be considered as the drawer of a new bill, payable at the same place, in favor of the indorsee.

Is, then, the notice of dishonor parcel of the contract? The manner in which, by the 165th section, it is connected with the citation in judgment, would at first raise an impression that it was not, but only a step in the remedy at law; but, upon consideration, we think it is parcel of the contract. The indorser contracts to pay the bill, not primarily or absolutely, but on two conditions: one, the dishonor by the drawee, or acceptor, on due presentment; the other, the due notification to him of such dishonor. Unless these be performed, or some special circumstances have occurred which waive them, and are therefore equivalent to performance, the indorser breaks no contract by non-payment; no liability has attached upon him. Being in law a new drawer of the bill, the same state of things is supposed to exist as between him and the indorsee as the law supposes between the drawer and payee. He is taken to have assets in the hands of the drawee, and to give the indorsee an order for payment of the bill out of them; but he does not make any contract affecting the liability of his general funds, except on the condition of a due demand on the drawee, the supposed holder of those assets, and a refusal by him to pay, duly notified to himself. If there were any difference in this respect between the two systems of law, this being a French bill, we ought to be guided by the French law; but there is none. The Code de Commerce, art. 140, describes the obligation of the indorser to the holder as one of "garantie solidaire," of guaranty that extends to the whole amount of the bill; and Pothier cites the ordinance, which gave the law when he wrote, to the same effect. Contrat de Change, p. 1, ch. 5, § 4, No. 148.

The same learned writer is also of the opinion which we have expressed upon the principal question. At section 5 of the chapter last referred to, under the title, "According to what law must the form of protests be regulated, the time of making them, or of notifying them," he says (No. 155) that for all these things the law of the place where the bill is payable must be followed; and the reason he gives shows that he considered the notice to be part of the contract; for he says, according to the maxim before cited, that the parties must be taken to have contracted in the place where the payment is to be made; and then adds that contracts must be regulated according to the laws and usages of that place to which the contracting parties must be considered to have submitted themselves, according to the rule: "In contractibus veniunt ea quæ sunt moris et consuetudinis in regione in quâ contrahitur." Upon principle, therefore, and this authority, we are of opinion that the French law regulated the time of giving notice of this dishonor; and, as the notice was given in due time according to that law, our judgment must be for the plaintiff.

Rule discharged.

WHITEHEAD AND OTHERS, ASSIGNEES OF BENBOW, A BANKRUPT, *v.* WALKER.

IN THE EXCHEQUER, JANUARY 31, 1842.

[*Reported in 9 Meeson & Welsby, 506.*]

ASSUMPSIT by the indorsee against the indorser of a foreign bill of exchange. The declaration stated that heretofore, to wit, on the 8th of August, 1834, and before the bankruptcy of Benbow, in parts beyond the seas, certain persons made their bill of exchange in writing, directed to Messrs. Grayhurst & Co., and thereby requested them to pay to the defendant, ninety days after sight, £721 0*s.* 3*d.*, value received; that the defendant indorsed the said bill to W. Swainson, who indorsed it to Willis & Co., who indorsed it to Benbow; and that the said Grayhurst & Co. had sight of the said bill, but had not paid the same.

Seventh plea. That before the said bill became due, or had been presented for payment, and after the indorsement of the same to Willis & Co., and before the indorsement to Benbow, the said bill was presented to Grayhurst & Co. for their acceptance; that Grayhurst & Co. refused to accept the same; that thereupon the bill was protested for non-acceptance; and that Benbow, as well as Willis & Co., at the time

of the indorsement to Benbow, had notice that the said bill had been so presented, and had been so refused, and protested for non-acceptance. Verification.

Ninth plea. That before the said bill had become due, or had been presented for payment, and after the indorsement thereof to Willis & Co., and before the indorsement to Benbow, the bill was presented to Grayhurst & Co. for their acceptance, and was refused acceptance; that the bill was thereupon, and before the indorsement to Benbow, duly protested for non-acceptance, whereof the defendant afterwards, and before the indorsement to Benbow, had notice, whereby an action then accrued to Willis & Co. to recover the amount of the bill from the defendant; that Benbow, as well as Willis & Co., at the time of the indorsement to Benbow, had notice that the bill had been so presented for and refused acceptance, and protested for non-acceptance; and that the cause of action in this plea mentioned did not accrue to Willis & Co. at any time within six years, and before the commencement of this suit. Verification.

To the seventh plea there was a general demurrer. The ground of demurrer stated was that it was no answer to an action for non-payment of a bill of exchange to show that it was dishonored when presented for acceptance, and that the party taking it, and suing on it, had notice of such dishonor. Joinder in demurrer.

To the ninth plea he demurred specially: the causes assigned were that the cause of action was for non-payment of the bill, whereas the plea answered a cause of action for non-acceptance; that there is an implied promise on the part of the drawer and indorsers of a bill of exchange that it shall be paid as well as accepted; that it was the duty of the drawer and indorsers, on notice of the non-acceptance, to enable the drawer to pay the bill, from the neglect to do which a fresh promise arose; that it was no answer to an action for such breach to show that there had been a previous breach of such promise; that the plaintiffs might waive the first breach, and bring an action on the second breach; that the remedy for the first breach having expired was no answer to an action on the second breach; that the Statute of Limitations ran from the time when the cause of action mentioned in the declaration accrued, and not before; and that the plea was double. Joinder in demurrer.

The case was argued at the sittings after last Michaelmas Term (Nov. 26 and 27) by

Crompton, for the plaintiffs. The pleas demurred to afford no answer to this action. The contract of the drawer of a bill of exchange is that the drawee not only shall accept the bill, but shall pay it at maturity; and therefore a cause of action accrues to the holder on its

non-payment when due. No doubt the drawer may be sued upon the breach of his contract by the non-acceptance by the drawee, Mitford v. Mayor; but no case can be cited to show that he must be so sued, and that the holder may not take advantage of the subsequent breach by non-payment. Dunn v. O'Keefe is an authority to show that a drawer who has had no notice of the non-acceptance may yet be sued by an indorsee for value who had no knowledge of the dishonor. But the argument for the defendant must be that, a right of action having once vested by the non-acceptance, the Statute of Limitations runs from that period, even against an innocent indorsee. The rule of law which compels a party who takes a qualified acceptance to give notice of that fact to the drawer, Sebag v. Abitbol;[1] Bayley on Bills, 253 (5th edit.), clearly implies that he is to have a right of action against the drawer on non-payment of the bill; for such notice can only be required for the purpose of preserving a right to sue on the non-payment. [PARKE, B. The reason of the notice in that case is that, inasmuch as the acceptance is not in the form which had been stipulated for by the drawer, he is entitled to be informed of that fact; and the notice may constitute some evidence of his having assented to the acceptance in a qualified form. ALDERSON, B. Why is notice given of non-acceptance? Because the contract is then broken: then, if so, can it be broken again?] The breach of contract by non-acceptance may be waived, and the drawer may be sued on the non-payment. Marius, in his Advice concerning Bills of Exchange, p. 19 (4th edit.), says, "If a bill so made payable [after sight] be omitted to be presently upon refusal protested for non-acceptance, all that time which shall run out between the private presenting of the bill and protesting thereof is lost time, and is not to be accounted as part of the number of days mentioned in the bill of exchange, except the party on whom the bill was drawn do, of his own free will, acknowledge to have seen the bill from the first day it was privately presented to him." And after saying that, if a bill is refused acceptance, it shall be protested for non-acceptance, and thereupon the drawer and indorser must give security for payment, with damages and costs, if it be not paid by him to whom directed at the time limited in the bill, he adds (p. 28): "But if a protest be returned for want of payment, and if you have had security already given you on the protest for non-acceptance, or for want of better security, then, upon receipt of your protest for non-payment, you may only acquaint the drawer (or party that took up the money) therewith, and tarry out the same proportion of time at which the bill was made payable, to be accounted from the time it fell due, before you demand your principal money, with the re-exchange and charges,

[1] 4 M. & Selw. 466.

of the party that drew the bill, or his surety; who, according to the law of merchants, are bound, jointly and severally, to repay the same upon the protest for non-payment." These passages are adopted as law into Comyns's Digest, tit. Merchant (F. 8), (F. 9), and show clearly that the holder has a right to retain a bill after acceptance has been refused, and to sue the drawer on non-payment at maturity. So, also, where a bill has been accepted *supra* protest, for the honor of the drawer, and has been presented for payment to the drawee, and to the acceptor for honor, the drawer may be sued for the non-payment. Hoare v. Cazenove,[1] Williams v. Germaine. There are precedents in 1 Wentw. 302, and 2 Chitty on Pleading, 100, of declarations by the first indorsee against the first indorser, after protest for non-acceptance, and also for non-payment. See also another precedent, similar in principle, in 1 Wentw. 315. And, in Auriol v. Thomas, the interest was calculated from the notice of non-payment.

Bovill, contra. The general rule on this subject, as laid down in all the text-books of authority, is that, although the holder of a bill of exchange is not bound to present it for acceptance, yet if he thinks fit to do so, and acceptance is refused, he is bound to give notice of that fact to all the parties to the bill to whom he desires to resort for payment. Molloy, de Jure Maritimo, b. 2, c. 10; Chitty on Bills, 272 (9th ed.); Bayley on Bills, 252 (5th ed.). And, after presentment for acceptance and refusal, a right of action vests immediately, and the holder need not again present the bill for acceptance. Hickling v. Hardey.[2] Or, if he does so, and acceptance is again refused, he is not bound, if payment be also afterwards refused, to protest it for non-payment. De la Torre v. Barclay.[3] For by the refusal of acceptance he acquires a complete cause of action against the drawer and the indorsers. Starke v. Cheeseman,[4] Mitford v. Mayor. It is at that period, accordingly, that the liabilities of all the parties to the bill are to be determined; and all who take the bill subsequently to the non-acceptance and protest take it with all its infirmities, Crossley v. Ham; unless, indeed, in the case of a subsequent holder for value, who takes it without notice of the dishonor. Here, however, it is admitted by the demurrer that the bankrupt had notice of the non-acceptance and protest before the indorsement to him, and he therefore stands in the same situation as the previous indorsees. It follows from these principles of law that another new cause of action cannot afterwards arise on the non-payment of the bill: if it could, then a recovery in an action brought on the non-acceptance would be no bar to a subsequent action against the same party on the non-payment. The drawing of a bill of exchange

[1] 16 East, 391.
[2] 7 Taunt. 312.
[3] 1 Stark. Rep. 7.
[4] 1 Ld. Raym. 582.

is the creation of a debt: it is evidence of an existing debt from the drawer to the payee, Starke v. Cheeseman, Macarty v. Barrow,[1] Bishop v. Young,[2] Workman v. Leake;[3] and the contract of the drawer is that another person, the drawee, shall take upon himself payment of such his debt, according to the terms of the bill; and the moment the drawee commits an unqualified breach of that engagement the debt becomes payable immediately, and the right of action against the drawer is vested. The plaintiffs must contend for the existence of two concurrent causes of action against the same party arising out of the same contract, which is altogether repugnant to legal principles.

Crompton, in reply. The argument on the other side is, that because a right of action vests on the non-acceptance, therefore the second breach, by non-payment, never comes into operation; but that is assuming the whole question in dispute. And the passage already quoted from Marius shows clearly that after protest for non-acceptance recourse may be had to the drawer on default in payment. The position that the mere drawing of a bill of exchange creates a present debt from the drawer is questioned by Lord Ellenborough in Storey v. Barnes.[4] *Cur. adv. vult.*

The judgment of the court was now pronounced by

Parke, B. The question raised by the pleadings in this case is whether, if the indorsee of a foreign bill of exchange has presented it for acceptance, and (acceptance having been refused) has duly presented it and given notice to the drawer (for the defendant, the indorser, is in the same situation), and so has acquired a right of action against him by reason of the non-acceptance, a new right of action afterwards accrues to him on the subsequent presentment of the bill for payment, and non-payment according to its tenor. The plaintiffs, indeed, are not the indorsees who presented the bill, but they are averred to have taken the bill with notice of the fact of presentment and dishonor, and therefore stand in the same situation, and are not to be considered as having a title as innocent indorsees. Dunn v. O'Keefe. The practical importance of the point in the present case arises from the delay of the holder in bringing his action. The non-acceptance and the protest thereon occurred in September, 1834. The bill, according to its tenor, would not be payable till the subsequent month of December, and this action was commenced in November, 1840: so that, if a right of action accrued in December, 1834, the Statute of Limitations cannot be successfully pleaded; whereas, if there was no right of action accruing subsequently to the protest for non-acceptance in September, 1834, the statute is a bar.

[1] 2 Stra. 949; s. c. cited 3 Wils. 16.
[2] 2 Bos. & P. 83.
[3] Cowp. 22.
[4] 7 East, 440.

On the part of the plaintiff, it was contended that, although he undoubtedly might have brought an action in the month of September, 1834, founded on the non-acceptance, yet it was optional with him to do so or not; that he might, if he thought fit, waive that action, and proceed merely on the ground of the subsequent non-payment in December, 1834. For the drawer of a bill, it was contended, enters into a double engagement with the payee, and through him with the successive holders of the bill: namely, first, that the drawee shall accept the bill, when regularly presented to him for acceptance; and, secondly, that he shall pay the bill, when regularly presented to him for payment. And if this be a correct representation of the engagement entered into by the drawer, the conclusion seems unavoidable, that whatever right of action the holder might have acquired by the non-acceptance, he certainly is not precluded from suing in respect of the default of payment. But we are of opinion that the contract entered into by the drawer is not such as is contended for by the plaintiff, and that he in fact enters into one contract only; namely, in the case of a bill made payable after sight, that the drawee shall, on the bill being presented to him in a reasonable time from the date, accept the same, and, having so accepted it, shall pay it when duly presented for payment according to its tenor; and, in the case of a bill payable after date, that the drawee shall accept it, if it is presented to him before the time of payment; and, having so accepted it, shall pay it when it is in due course presented for payment; or, if it is not presented for acceptance at all, then that he shall pay it when duly presented for payment.

The counsel for the plaintiff, in support of his view of the law, relied mainly on some passages which he cited from the work of Marius on Bills of Exchange, some of which are adopted in Comyns's Digest, tit. Merchant (F. 8 and F. 9). But, with respect to those passages, we must remark that the work of Marius, though undoubtedly one of authority in its way, is scarcely to be looked at as a legal treatise on the subject of bills of exchange. It is, as its title imports, a work giving good practical advice from a practical man to persons receiving and negotiating bills of exchange. The author was a public notary, who lived in the middle of the seventeenth century, when questions of mercantile law were much less perfectly understood than they are now. In some of his notions, he was clearly mistaken; as, for instance, he considers the holder of a bill of exchange to be in all cases bound to present it for acceptance; and it seems very doubtful whether he supposed the effect of non-acceptance to be any thing more than that of rendering it incumbent on the drawer to find better security for the satisfaction of the holder. It is not, however, absolutely necessary to decide that Marius is wrong, for he nowhere lays down the proposition now insisted on; namely, that after a protest for non-acceptance a

second right of action accrues to the holder on the non-payment. He speaks, indeed, of the holder retaining the bill after non-acceptance, and applying for payment, and suing on default of payment; and this, as a matter of prudence, may probably be the wisest course which a party can pursue. In spite of the non-acceptance, the drawer still may pay the bill when at maturity; and the holder, having by protest and notice on non-acceptance put himself in a condition to sue the drawer, may very reasonably, as a matter of prudence, retain the bill, and endeavor to obtain payment when the bill is at maturity, and not involve himself in litigation until there has been a failure of payment as well as of acceptance. It by no means, however, follows, because this is spoken of as being, what probably it still is, the usual course, that any second right of action arises on the second default. For let us consider what is the nature of the right which the holder acquires on the default of the drawee to accept. It is clear (whatever might formerly have been considered on the subject) that by the non-acceptance, followed by the protest and notice, the holder acquires an immediate right of action against the drawer, — a right of action, be it observed, not in respect of any special damage from the non-acceptance, but a right of action on the bill, *i. e.* a right of action to recover the full amount of the bill. The effect of the refusal to accept is (according to the language of the Court of King's Bench, in Macarty *v.* Barrow, as quoted by C. J. Wilmot, in 3 Wils. 16) that the drawee says to the holder, "I will not pay your bill: you must go back to the drawer, and he must pay you." The holder thus acquires by the non-acceptance the most complete right of action against the drawer which the nature of the case admits, and no subsequent act or omission of the drawee can give him a more extensive right against the drawer than he has already acquired. But, further, on failure of acceptance, the holder is bound to give immediate notice to the drawer; and, if he omits to do so, he forfeits all right of action against him, not only in respect of the default of acceptance, but also in respect of the subsequent non-payment. Now, it is very difficult to reconcile this doctrine with the notion that a new right of action arises from the non-payment; for, if that were so, it could hardly be that such new right of action could be destroyed by the previous neglect to give notice of a matter unconnected with that out of which the second right of action is supposed to arise. The argument of the plaintiffs must be that a second right of action on the bill arises from the default of payment in those cases only in which the holder has duly given notice of the non-acceptance, *i. e.* in those cases only in which the holder, by the hypothesis, must have already acquired a right of action precisely similar to, and co-extensive with, that which is thus supposed to vest in him by the default of payment. This seems to us to be a proposition so much fraught with inconsistency,

and so entirely destitute of principle and authority, that we cannot hold it to be law. It may be added that, if the law were as is contended for the plaintiffs, this inconvenience would follow, that the holder of a bill might at the same time be prosecuting two actions on the same bill against the same party, for the recovery of precisely the same sum.

On these grounds, we are of opinion that there must be judgment for the defendant on the demurrers to his 7th and 9th pleas.

Judgment accordingly.[1]

CASTRIQUE v. BERNABO.

IN THE QUEEN'S BENCH, NOVEMBER 9, 1844.

[*Reported in* 6 *Queen's Bench Reports*, 498.]

DECLARATION in debt, on a writ issued 25th May, 1844, by indorsee of a bill of exchange, drawn 20th January, 1844, at four months, against the indorser, averring acceptance by the drawee, non-payment by him at maturity, and that the bill was then protested, of which defendant then had due notice.

Plea: that defendant had not due notice of non-payment. Issue thereon.

On the trial, before Lord Denman, C. J., at the London sittings after last Trinity term, the plaintiff proved that a letter to defendant, containing notice of dishonor, was put into a receiving house in the city of London, between two and three in the afternoon of the 25th of May, the day on which the action was commenced. The defendant resided in Oxford Street, London. For the defendant, evidence was given of the routine of the post-office as it existed some years ago; from which it appeared that, at the time referred to by that evidence, a letter so put into a receiving house in the city would not be delivered in Oxford Street before six o'clock in the same evening. It appeared, further, that the offices of the court were open on the 25th of May till five o'clock only. On this evidence, it was contended that no right of action had existed at the time when the suit was commenced. It was however suggested, on the part of the defendant, that an alteration had recently been made in the post-office arrangements, by which the

[1] Bright *v.* Purrier, 8 Burr. 1687, (*semble*); De la Torre *v.* Barclay, 1 Stark. 7; Hickling *v.* Hardey, 7 Taunt. 812; Cowan *v.* Key, Mor. Dict. Dec. 1621; Watson *v.* Tarpley, 18 How. 517; Wallace *v.* Agry, 4 Mas. 336; Sterry *v.* Robinson, 1 Day, 11; Robinson *v.* Ames, 20 Johns. 146, 150; Winthrop *v.* Pepoon, 1 Bay, 468, *accord.*

The expression "acceptance waived" in a bill precludes the holder from resorting to the drawer until after dishonor by non-payment. Denegre *v.* Milne, 10 La. An. 324; English *v.* Wall, 12 Rob. La. 182; Webb *v.* Mears, 45 Pa. 222. But see Carson *v.* Russell, 26 Tex. 452, *contra*; and conf. Reg. *v.* Kinnear, 2 M. & Rob. 117. — ED.

delivery was accelerated. The Lord Chief Justice, with the consent of the parties, directed that evidence of this should be procured, that the plaintiff should be nonsuited, but that leave should be given to move for a verdict for the plaintiff, if the evidence should justify it. Another cause was then called on; and, in the course of the day, evidence was given that, according to the routine of the post-office on 25th May, the letter would reach Oxford Street between four and five in the afternoon.

Willes now moved to enter a verdict for the plaintiff, according to the leave reserved. The evidence showed the possibility of the writ being issued at a time later than that at which the notice would arrive. Which occurrence took place first, does not directly appear. But the presumption of law is that, where two acts appear to have been done, and it is not shown in what order they have been done, that order is to be assumed which will make the whole regular. The action was maintainable instantly after the notice was received. Siggers *v.* Lewis. In Aikman *v.* Conway, it was holden that, if two acts be done in the same day, the court will not inquire which was done first, but will presume that they were done in the regular order. The declaration shows a notice before action brought: if such notice had not been given, the defendant might have pleaded in abatement. Com. Dig. Abatement (G. 6).

Lord Denman, C. J. The rule of law is that, where there is a doubt which of two occurrences took place first, the party who is to act upon the assumption that they took place in a particular order is to make the inquiry. That is founded on reason. An opposite rule would justify a party in suing where he had not ascertained his right. It follows that the plaintiff, in this case, has taken upon himself to show that a right of action existed before he commenced his suit; and, not having done this, he must fail.

Williams, Coleridge, and Wightman, JJ., concurred.

Rule refused.[2]

[1] 8 M. & W. 71.

[2] According to Flint *v.* Rogers, 15 Me. 67; Green *v.* Darling, 15 Me. 139 (*semble*); Shed *v.* Brett, 1 Pick. 401; N. Eng. Bank *v.* Lewis, 2 Pick. 125 (qualifying Stanton *v.* Blossom, 14 Mass. 116); City Bank *v.* Cutter, 3 Pick. 414; Dennie *v.* Walker, 7 N. H. 199 (*semble*); Manchester Bank *v.* Fellows, 28 N. H. 302, the holder may begin an action against a drawer or indorser on the last day of grace, the moment notice of dishonor has been sent.

On the other hand, it was held in McFarland *v.* Pico, 8 Cal. 626; Outhout *v.* Ballard, 41 Barb. 33; Bevan *v.* Eldridge, 2 Miles, 353; Coleman *v.* Carpenter, 9 Barr, 178 (*semble*), that, although notice of dishonor might be sent on the last day of grace, no action could be begun against drawer or indorser until the following day.

In Smith *v.* Bank of Washington, 5 S. & R. 318, an indorser's liability was not considered complete until after the expiration of a reasonable time for the communication of the notice of dishonor. — Ed.

GIBBS AND OTHERS v. FREMONT.

IN THE EXCHEQUER, JULY 6, 1853.

[*Reported in* 9 *Exchequer Reports*, 25.]

ASSUMPSIT by indorsee against drawer of four bills of exchange, for payment respectively, at ten days' sight, to one F. Huttmann, or order, of $6,000, $5,000, $4,500, and $4,000 of the value of £3,988 12*s.* 9*d.*, and protested for non-acceptance. There were pleas denying the indorsement, presentment for acceptance, &c.

At the trial before Alderson, B., at the Middlesex sittings in last Easter term, it appeared that in March, 1847, the defendant in California drew the bills in question, in the following terms:—

"CIUDAD DE LOS ANGELOS, UPPER CALIFORNIA,
"$6,000. March 18, 1847.

"At ten days' sight of this my second of exchange, first and third remaining unpaid, pay to F. Huttmann, or order, Six Thousand hard Dollars, for value received, and charge the same to the account of

"Your obedient servant,
"J. C. FREMONT,
"*Governor of California.*"

"To Hon. JAMES BUCHANAN,
Secretary of State of the U. States,
Washington, Di. Co."

On the 12th of October, the bills were presented for acceptance to the drawee at Washington, who refused to accept them, and on the same day they were protested for non-acceptance. At that time, the defendant was at Washington; and notice of dishonor was served on him there. The bills were indorsed in London by Huttmann to the plaintiffs for value.

It was conceded that the plaintiffs were entitled to recover the amount of the bills; and the only question was at what rate the interest was to be calculated, there being evidence that the current rate was higher in California than at Washington. The learned judge left it to the jury to say what was the average rate of interest in California and Washington respectively, from the year 1847 up to the time of action brought; and also whether the plaintiffs were entitled to recover, as damages, interest; and, if so, whether the interest was to be calculated at the California rate or the Washington rate. The jury found that the California rate was £25 per cent and the Washington rate £6 per cent, and that the plaintiffs were entitled to recover

interest at the Washington rate. A verdict was then entered for the plaintiffs for £5,314 17*s.* 1*d.*, being the principal and £6 per cent interest; and leave was reserved for the plaintiffs to move to increase the amount by adding £19 per cent interest, if the court should be of opinion that the learned judge ought to have directed the jury that, in point of law, the plaintiffs were entitled to recover the California rate of interest.

A rule *nisi* having been obtained accordingly,

Bovill and *Aspland* showed cause (June 6). No interest being reserved on the face of the bills, it was a question for the jury whether the plaintiffs had sustained any damage requiring the payment of interest, and, if so, at what rate it was to be paid. Gantt *v.* Mackenzie, Du Belloix *v.* Lord Waterpark.[1] The jury have properly found that the plaintiffs are entitled to interest at the rate at Washington. The plaintiffs rely on a manuscript note in Chitty on Bills, page 683, 9th edit. of a *nisi prius* case of Cougan *v.* Banks, where, in an action upon a bill drawn in Bermuda on England, which ought to have been paid in England, the plaintiff recovered £7 10*s.* per cent interest, being the rate at Bermuda. The roll, however, in that case has been examined, and from that it only appears that the plaintiff had judgment for his "reasonable damages," consequently the £7 10*s.* per cent may not have been given solely on account of interest, but may have included re-exchange and expenses. In Roscoe on Bills, p. 398, n., it is said that in America it has been held, that, on a note made in one place, payable in another, interest is recoverable according to the legal rate of the place where it is payable. The amount of interest recoverable does not depend on the place where the contract was made, but on the place where the instrument is payable. In Cooper *v.* Earl of Waldegrave,[2] a bill of exchange was drawn and accepted in Paris, and made payable in England. The drawer and acceptor were both living there; and it was held that, the default being made in England, interest was payable according to the English and not the French law. Lord Langdale, M. R., there says: "The contract of the acceptor, which alone is now to be considered, is to pay in England: the non-payment of the money, when the bill becomes due, is a breach in England of the contract which was to be performed in England. Upon the breach, the right to damages or interest immediately accrues. Interest is given as compensation for the non-payment in England, and for the delay of payment suffered in England; and I think that the law of England, that is, the law of the place where the default has happened, must govern the allowance of interest which arises out of that default." The true test is for the jury to consider where was the contract broken, and

[1] 1 D. & R. 16. [2] 2 Beav. 282.

what is the damage resulting from that breach of contract at the particular time and place. Here the bills were payable at Washington, and there also the cause of action arose, Whitehead *v.* Walker; and, moreover, the notice of dishonor was given to the defendant in Washington.

Willes, in support of the rule. This case is governed by the *lex loci contractus*, and not by the *lex loci solutionis*. The accidental circumstance of the defendant being at Washington, and having there notice of dishonor, does not alter his liability, which arises from general principles of law. In the case cited from Roscoe on Bills, the promissory note was drawn in one place and made payable in another, and there the *lex loci solutionis* would prevail. In Cooper *v.* Earl of Waldegrave,[1] the bill was payable in England, so that both as against the drawer and acceptor the rate of interest would be the same. If a bill is drawn at a particular place upon a person at another place, and the latter accepts it generally, that is a contract to pay at the place at which the bill was drawn. The acceptor may, however, limit his liability by a conditional acceptance, or by making the bill payable at a different place; but the rights and liabilities of the drawer are fixed the moment he has drawn the bill. The contract of the drawer is that the person to whom the bill is directed shall accept and pay it; and, if not, the drawer, provided he has due notice of default, will pay it at the place where it was drawn. The law in this respect does not depend on any accidental exception from a general rule, but is founded on invariable mercantile practice. Suppose a merchant at Cadiz draws a bill on a merchant in London, and the latter refuses to accept it, the bill would be protested for non-acceptance, returned to Cadiz, and notice given to the drawer: if he made default, proceedings would be taken, not in London, but at Cadiz, and the damages would be the rate of interest payable at that place. The defendant must establish this, that, upon non-acceptance and notice to the drawer, his contract is to pay at the place where the drawee ought to have accepted. There is not only good reason why the contract of the drawer should be held a contract to pay at the place where the bill is drawn, but the case of Cougan *v.* Banks is a direct authority in favor of that position. The subject of several indorsements in different States where the rate of interest varies is discussed in Story on the Conflict of Laws, § 314, p. 512, 4th ed., where it is said: "What rule, then, is to govern? The answer is, that in each case the *lex loci contractus*. The drawer is liable on the bill according to the law of the place where the bill was drawn; and the successive indorsers are liable on the bill according to the law of the place of their indorsement, every indorsement being treated as

[1] 2 Beav. 282.

a new and substantive contract." The same learned author goes on to say, § 315, "the drawer and indorsers do not contract to pay the money in the foreign place on which the bill is drawn, but only to guaranty its acceptance and payment in that place by the drawee; and, in default of such payment they agree, upon due notice, to reimburse the holder in principal and damages at the place where they respectively entered into the contract." And he further observes, § 316, "that the time when the payment of such a bill is to accrue is to be according to the law of the place where the bill is payable." The law is stated in similar terms in Story on Bills, § 153, p. 171; and the same doctrine has been adopted by Pardessus, Droit Commercial, pt. 7, tit. vii., c. 2, art. 1500. The principle to be deduced is that acceptance and payment are governed by the *lex loci solutionis*, but the obligation of the drawer depends on the *lex loci contractus*. Loans bear interest at the place where they are made, unless they are payable elsewhere. [ALDERSON, B., referred to Rothschild *v.* Currie. MARTIN, B. Allen *v.* Kemble [1] in effect decides this case. There it is said: "The drawer, by his contract, undertakes that the drawee shall accept, and shall afterwards pay the bill, according to its tenor, at the place and domicile of the drawee, if it be drawn and accepted generally; at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of domicile of the drawee. If this contract of the drawer be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with such interest, damages, and costs as the law of the country where he contracted may allow."] *Cur. adv. vult.*

The judgment of the court was now delivered by

ALDERSON, B. The general rule in all cases like the present is that the *lex loci contractus* is to govern in the construction of contracts. But that applies only where the contract is not express. If it be special, it must be construed according to the express terms in which it is made.

Now, a bill drawn upon a third person in discharge of a present debt is, in truth, an offer by the drawer that, if the payee will give time for payment, he will give an order on his debtor (the acceptor) to pay a given sum at a given time and place. The payee agrees to accept this order, and to give the time, with a proviso that, if the acceptor do not pay, and he the payee (or the holder of the bill) give notice to the drawer of that default, the drawer shall pay him the amount specified in the bill, with lawful interest.

This is, then, the contract between the parties. If the interest be

[1] 6 Moore, P. C. 314.

expressly, or by necessary implication, specified on the face of the instrument, there the interest is governed by the terms of the contract itself. But, if not, it seems to follow the rate of interest of the place where the contract is made. So if the mode of performing it be expressly or impliedly specified. Rothschild v. Currie. In the case of a bill drawn at A., it *prima facie* bears interest, as a debt at A. would do, if nothing else appear. But, if that bill be indorsed at B., the indorser is a new drawer; and it may be a question whether this indorsement is a new drawing of a bill at B., or only a new drawing of the same bill, that is, a bill expressly made at A. In the former case, it would carry interest at the rate at B.; in the latter, at the rate at A. On this subject, we find a difference of opinion in the books, Mr. Justice Story (Conflict of Laws, § 314) maintaining the former, and Pardessus (Cours de Droit Commercial, pt. 7, tit. 7, c. 2, art. 1500) the latter opinion. But this is a contract at Ciudad de los Angelos, by which the defendant there offers the payee, in discharge of a debt due there, the payment at Washington by an acceptor there of a given sum. That sum is not paid. The defendant's original liability then revives on notice of dishonor duly given to him. The defendant becomes liable to pay, as he was liable at first. Now, at first, he would have paid the money at Ciudad de los Angelos, and, if he did not, he would have been liable to pay interest at the usual rate in California, for a period as long as the debt remained unpaid. That amount he ought to pay now.

This point was expressly ruled in Allen v. Kemble. It was also so ruled in Cougan v. Banks. And this is not to be left to the jury, for it depends on the rule of law. The amount of the interest in each place is to be so left, and so also is the question whether any damage has been sustained requiring the payment of interest at all; for those are questions of fact. Here the jury have found interest to be due, and that there was damage which ought to be recovered in the shape of interest. They also have found what the usual rate of such interest is at Washington and in California. But which rate is to be adopted by them is, as we think, a question purely of law for the direction of the judge to the jury. We think that direction should have been in this case that the California rate should be adopted by them, inasmuch as the contract of the drawer was made there. Therefore, this rule must be absolute to enter the verdict for the plaintiff, with £19 per cent additional interest.

Rule absolute accordingly.[1]

[1] Cougan v. Banks, Chitty Bills (10 ed.), 172, 489; Allen v. Kemble, 6 Moo. P. C 314; *Re* State Ins. Co., 32 L. J. Ch. 300; Crawford v. Br. Bank, 6 Ala. 12 (overruling *dictum* in Hanrick v. Adams, 9 Port. 10); Bailey v. Heald, 17 Tex. 102 (overruling Able v. McMurray, 10 Tex. 350), *accord*. — Ed.

LOUIS CASTRIQUE, Appellant, v. GIUSEPPE BUTTIGIEG, Respondent.

In the Privy Council, November 27, 1855.[1]

On Appeal from the Royal Court of Appeal at Malta.

[*Reported in* 10 *Moore's Privy Council Cases*, 94.]

The appellant was a merchant resident in London, and the respondent was also a merchant resident at Malta.

The appeal was brought against two judgments of the Royal Court of Appeal at Malta, confirming two judgments of the Royal Court of Commerce of that island, in two several actions brought by the appellant against the respondent. In the first action, the appellant was plaintiff, as indorsee of a bill of exchange for £55, drawn in Malta on the 4th of February, 1846, by N. J. Aspinall upon J. A. Mathieson, of Glasgow, payable ninety days after date to the order of the defendant (the respondent), specially indorsed by him to the plaintiff, and accepted by the drawee, but not paid at maturity, and duly protested. The defendant denied his liability, on the ground that he had bought and remitted the bill for account of the plaintiff.

The other action was on a bill of exchange for £200, payable at ninety days after date to the order of the defendant, drawn in Malta on the 24th of February, 1846, by Davidson & Scerri, on Williams & Waring of London, specially indorsed by the defendant to the plaintiff, but which the drawees refused to accept or pay, and which was duly protested. In this case also, the defendant denied his liability, on the ground of his having bought and remitted the bill on account of the plaintiff.

The transaction out of which the present actions arose began by a letter of the 24th of November, 1845, from the plaintiff to the defendant, enclosing four bills for the sums of Sc. 900, 1,250, 1,148, and 240 respectively, requesting him to remit the proceeds by bills on London. The defendant, in answer to this letter, wrote on the 4th of December, 1845, stating that the bills had been accepted, and added, "When due, I shall encash the same to your credit, and reimburse you the amount thereof by bills on your place." By letter of 4th of February, 1846, the defendant informed the plaintiff that two of the bills enclosed in the defendant's letter of 24th of November, being those for Sc. 900

[1] Present: the Right Hon. T. Pemberton Leigh, the Right Hon. the Lord Justice Knight Bruce, the Right Hon. Sir Edward Ryan, the Right Hon. Sir John Patteson, and the Right Hon. Sir William H. Maule.

and 240, "by me encashed to your credit, fell due on the 1st inst., and, *per contra*, I debit you with Sc. 660, for the enclosed appoint for £55, at ninety days' date, on J. A. Mathieson of Glasgow, which I bought at 50*d.* per dollar." This letter enclosed the last-mentioned bill, which was the subject of the first action.

On the 24th of February, 1846, the defendant wrote to the plaintiff, enclosing the bill for £200, the subject of the second action. In this letter, he said: "I confirm my last of the 4th inst., enclosing an appoint for £55, of which herewith you have the second, together with another appoint for £200, which I have just bought for you at 49¾*d.*, including the brokerage, for which I have debited your account in Sc. 2,414. 6.; and, *per contra*, I encashed yesterday to your credit your two remittances of Sc. 1,250 on Fabrizzi, and of Sc. 1,148. 10. upon Matteo German, both of this place." The last-mentioned two bills are the two others of the four bills sent in the plaintiff's letter of November the 24th, 1845.

On the 7th of March, 1846, *Edward Coombe*, for the plaintiff, wrote to the defendant, informing him that the bill for £55 had been duly accepted, but that Messrs. Williams & Waring, the drawees, had refused to accept the bill for £200, adding, "We have thought proper to protest the same, and debit you with 12*s.* cost of protest." On the 16th of March, 1846, the defendant wrote, "I have to acknowledge the receipt of your esteemed favor of the 7th, which has just reached me, with protest for non-acceptance of my remitted appoint of £200 on Williams & Waring of your place. The drawers have told me that that irregularity arises through the death of Mr. Waring, and that it will be paid at maturity." On the 24th of March, 1846, the defendant wrote to the plaintiff, informing him that on that day the house of Davidson & Scerri, the drawers of the bill for £200, had stopped payment. In answer to this letter, the plaintiff, on the 7th of April, 1847, wrote: "We duly received your favors of the 16th and 24th ult., the first of which acknowledged receipt of the protest for non-acceptance which we transmitted you for your remittance of £200 on Williams & Waring of this place, and intimated your opinion that the same would be paid, notwithstanding, at maturity. Your last informs us that the drawers of the said bill, as well as the drawees, stopped payment. We are sorry for that occurrence, but have nothing to do with it. You should have remitted us bills from a solvent house, and we must hold you responsible for the payment of the £200, at maturity." On the 24th of April, 1846, the defendant wrote: "By your esteemed favor of the 7th, I learn with surprise your pretensions to consider me responsible for the remitted appoint for £200, drawn by Davidson & Scerri of this place, whereas the same is entirely yours,

and as such does not concern me in any way," &c. On the 23d of April, 1846, the plaintiff wrote: "We are much surprised at not receiving from you another bill for the one of £200, on Williams & Waring, although you have known for some time that the same would not be paid at maturity, and is utterly useless to us. Surely, you do not intend to render us responsible for your having taken a bad bill: that would be contrary to every commercial precedent, and derogatory to the honor of any respectable house of business." On the 4th of May, 1846, the defendant wrote to the plaintiff, "Confirming my last of the 24th ultimo, respecting the bill for £200, for your account on Williams & Waring of your place, I have nothing now to mention, but to refer you to my before-mentioned last letter."

On the 12th of May, 1846, the plaintiff wrote: "We now see with regret that your remittance of £55 has been returned us dishonored, although accepted: we debit you with £55 10*s.* thereon. We hope you will contrive and send us another remittance, as we are at the present time, through sundry disappointments, very much in want of it."

It appeared in evidence that the two bills in question, which the defendant in his letters of the 4th and 24th of February, 1846, represented as bought by him at the exchanges of 50*d.* and 49¾*d.* per $, and charged in account at those rates, had really been bought at 50½*d.* and 50¼*d.*, and were consequently charged against the plaintiff at prices something more than 1 per cent higher than those actually paid. It appeared, by two accounts current given in evidence, that the defendant did not charge any commission on the bill remitted by him, but charged ½ per cent on money collected.

On the 6th of March, 1852, the Court of Commerce of Malta gave judgment for the defendant in both actions.

Both parties appealed against this judgment to the Royal Court of Appeal at Malta, the defendant complaining that it did not give him his costs of suit. That court, on the 4th of August, 1852, gave judgment, adopting the reasons given by the Court of Commerce, and confirmed both judgments.

The appeal was argued upon the merits by

Sir Frederic Thesiger, Q.C., and *Mr. C. E. Pollock*, for the appellant; and

Mr. Rolt, Q. C., and *Mr. Field*, for the respondent.[1]

The Right Hon. Sir William H. Maule. On the argument of the present appeal, it was insisted on the part of the appellant that the defendant was liable as indorser to all subsequent holders, his indorsement not containing any restrictive expression, such as the words "without recourse," and in the absence of any special agreement be-

[1] The statement of the case has been abbreviated. — Ed.

tween the plaintiff and defendant, either made in express terms or to be implied from the facts of the case, to restrict that liability as between the plaintiff and defendant; and that the circumstance of the defendant having acted as agent for the plaintiff did not afford such an implication. It was further contended that the defendant, having charged the plaintiff a profit of about one per cent on the price paid by him for the bills, had in effect taken a *del credere* commission, or had entitled the plaintiff to treat the transaction as a purchase of the bills from the drawers on the defendant's own account, and a sale of them to the plaintiff at an increased price, so as to place the defendant in the situation of an indorser for value of a bill, his own property, to the plaintiff. The plaintiff also contended that, inasmuch as it appeared that a sum of 600 *scudi* had been handed by Aspinall, the drawer of the £55 bill, to the defendant in respect of that bill, the defendant was at least liable to that amount.

On the part of the respondent, it was contended that he had acted as agent only of the appellant, and that this circumstance was of itself sufficient to show that he contracted no liability to his principal by his indorsement, at least by the law of Malta, by which, and not the law of England, it was contended that the case was to be governed.

With regard to the alleged charge of a higher price for the bills than was actually paid, it was contended for the respondent, either that such overcharge was made by mistake, as it appears to have been considered by the Maltese courts, or that it might be accounted for by the brokerage being included in one sum and not in the other; or, at any rate, that this difference did not produce the effect of making the defendant liable as indorser, if he could not otherwise have been so. As to the claim in respect of 600 *scudi* received from Aspinall, the drawer of the £55 bill, the respondent's counsel answered that it was not a claim which could be enforced to the present suit, which charged the respondent only as indorser.

It may be convenient to dispose of the last two questions before proceeding to the consideration of the first and principal one. As to the overcharge of the price paid for the bills, it seems to their lordships that, without adverting to the reasons given in the courts below, it sufficiently appears that, supposing it to have actually taken place, and even to have been designed, and not accidental, though it would be misconduct on the part of the respondent, it would not have the effect of inducing a liability on his part, in addition to, or in substitution of, that resulting from his character of agent, supposing him, independently of the overcharge, to have acted and to have been liable as agent only. The letters of the 4th and 24th of February, 1846, which enclosed the bills, and were written on the day they were drawn, describe

the bills respectively as "bought at 50*d.* per $," and "just bought for you at 49¾*d.*, including the brokerage." These expressions, accompanying the act of sending the bills, clearly import a purchase for the appellant, and not a sale to him by the respondent: if they contain a misrepresentation of the amount paid for them, the respondent may be answerable for his misconduct as agent; but he does not by writing that purport to act in any other capacity. It is like an agent buying goods for his principal, and overstating the price paid for them, a misconduct which would not make him liable as vendor or as warranting the goods. To give to the misrepresentation in question the effect of making the party who made it liable as on warranty, or as an indorser, would be to raise a contract between two parties, into which neither of them intended to enter. With regard to the claim as to the 600 *scudi*, it appears to their lordships that in the present suit, in which the plaintiff sues as indorsee only, such sum is not in question, and cannot be recovered; and that the judgment to be pronounced on the present appeal, like those in the courts below, will be without prejudice to any rights which may exist in respect of this claim.

The question, then, that remains to be considered is whether the respondent is liable to the appellant as indorser. In determining this question, it does not appear to be necessary to consider any peculiarity, if there be any on this subject, of the law of Malta. The case was argued, and appears to depend on the general merchant-law prevailing in all civilized countries. If there be in Malta any special form of writing which forms a necessary ingredient in an indorsement, the writing in the present case must be taken to be in that form; or, in other words, the indorsement was regular, the whole argument proceeding on that ground, and nothing appearing to the contrary. As to the question of the substantial liability of the respondent, the foreign code establishing the liability of an indorser as a general proposition, as well as the English text-writers to the same effect, are merely declaratory of the general mercantile law on the subject; and it is on this same law that the judicial decisions, both English and foreign, which were cited on both sides, proceeded. It is therefore to be considered whether, according to such general law, the facts appearing in the present case are sufficient to show that the respondent is liable, as indorser, to the appellant, his immediate indorsee of the bills in question.

The liability of an indorser to his immediate indorsee arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is, indeed, necessary to the existence of the contract in question; but that contract arises out of the written indorsement itself, the delivery

of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, of the parties, and the circumstances (such as the usage at the place, the course of dealing between the parties, and their relative situations) under which the delivery takes place. Thus a bill, with an unqualified written indorsement, may be delivered and received for the purpose of enabling the indorsee to receive the money for account of the indorser, or to enable the indorsee to raise money for his own use on the credit of the signature of the indorser,[1] or with an express stipulation that the indorsee, though for value, is to claim against the drawer and acceptor only, and not against the indorser, who agrees to sell his claim against the prior parties, but stipulates not to warrant their solvency. In all these cases, the indorser is not liable to the indorsee; and they are all in conformity with the general law of contracts, which enables parties to them to limit and modify their liabilities as they think fit, provided they do not infringe any prohibitory law. In the present case, therefore, it will be proper to consider under what circumstances the bills in question were indorsed. It is clear, from the correspondence referred to, that in the course of dealing between them the respondent was in the habit of acting as agent for the appellant in procuring and remitting for him bills on England, on account of money received by him for the appellant at Malta. The bills in question were remitted on account of the proceeds of four bills sent to the respondent by the appellant on the 4th of November, 1845, in a letter, requesting him to remit the proceeds by bills on London. This order was complied with on the 4th and 24th of February, 1846, when the bills in question were drawn and remitted, the first being described in a letter, enclosing it as a bill, "which I bought at 50*d.* per $," and the second as a bill "which I have just bought for you at 49¾*d.*, including the brokerage." These expressions amount to a notice to the appellant that the bills had been bought for his account, so as to become his property by the act of purchase, which was before they were indorsed by the respondent; and, as they were received by the appellant without objection, he appears to have consented to receive the bills as sent in the execution of his orders, and so as to give no further effect to the respondent's indorsements than belonged to them as indorsements, made under all the circumstances of which both parties were cognizant.

Assuming the bills to have been indorsed under these circumstances, — that is, to have been bought for the appellant in the execution of

[1] Case v. Spaulding, 24 Conn. 578; Dale v. Gear, 38 Conn. 15 (*semble*); Sherman v. Elder, 12 Iowa, 488; Larned v. Ogilvy, 20 Iowa, 410; Chaddock v. Vanness, 36 N. J. 517 (*semble*), *accord*. — ED.

the respondent's duty as his agent, and the appellant to have taken them with a knowledge of their having been so bought, — is the respondent liable to the appellant as indorser? It cannot be said that these circumstances necessarily excluded such liability. If it had been the intention of the parties, shown by their words or otherwise, that such liability should arise, there is nothing in the circumstances last adverted to which would prevent that intention taking effect. The employment of the respondent by the appellant as his agent generally which was one from which the respondent would make some profit, though none might be made on a transaction of remittance, would be a sufficient consideration for the respondent incurring the liability in question, if it were the intention of the parties that he should do so. It was urged, on the part of the appellant, that the intention of the parties must, in fact, have been that such liability should be incurred; for, if that were not the intention of the respondent, why did he indorse the bills at all? or, indorsing them, if he meant not to incur the ordinary liability of an indorser, why did he not adopt the course which it was said was usual when such restriction was intended, by adding words, such as, "without recourse," to his indorsement. To the first of these questions, it may be answered that, as it was necessary for safety of transmittance that the bills should be specially indorsed to the appellant, it was a convenient mode of effecting this object that the bills should be drawn payable to the respondent; and that, though the same object might have been attained by procuring the bills to be drawn payable to the order of the appellant, agents are usually and not unreasonably unwilling to disclose the names of their principals. It would be a mark of distrust of his correspondent (the appellant), if the respondent avoided so carefully to incur a liability on his account, though one against which the principal would be bound to indemnify him; and, further, that the bills so drawn and indorsed would be less negotiable than they would be with the addition of the respondent's name. This last reason applies to another mode in which the bills might be drawn without the respondent's name appearing; *i. e.*, by having them drawn payable to the order of the drawer, and indorsed by him, the respondent afterwards writing above the indorsement of the drawer, "Pay to the order of Castrique & Co."

With regard to indorsing the bills with the words "without recourse," by so doing the indorser would, indeed, have avoided all liability to any subsequent holder, as well as to his immediate indorsee; but such a course would have cast suspicion on the bills, would have rendered them less negotiable, and would probably have been very distasteful to the principal. It is to be observed that the bills, being payable at ninety days after date, would arrive in England many

weeks before their maturity; and it would therefore be important to the appellant that they should be so drawn and indorsed as to be readily negotiable. In putting his name on the bill as indorser, and thereby becoming answerable to holders subsequent to the appellant, the respondent adopted a mode of remitting bills which was reasonable and convenient for the purposes of the appellant, his principal, to whom he was bound by his duty as agent to remit in some reasonable and convenient mode, though he was not bound by such duty to incur any liability upon the bill. If it be said that the respondent, having clearly rendered himself liable as indorser to any subsequent holder of the bills, and not expressly restricted his liability to his immediate indorsee, ought to be considered as answerable to him, the answer is that this is the usual case with an accommodation bill, the accommodating party relying on the indemnity of the party accommodated; and, in the present case, though the agent might, if he would, indorse the bills he remitted, yet, not being bound to do so, he would not adopt this course, but would prefer some of the others above indicated, if his opinion of the solvency of his principal, or the state of accounts between them, rendered such caution necessary. If, therefore, the question on this appeal were to be determined upon principle, independent of authority, the committee would be of opinion that the respondent ought to be considered as an agent who, in the due execution of his duty to his principal, bought the bills for him, and caused them to be made payable to himself, and indorsed them for the purpose only of performing his duty in a manner beneficial and convenient to the principal, and that the principal had notice of these circumstances at the time of the delivery. This state of things, it appears to the committee, would, in the absence of any other circumstances, — such as express words or local usage, or a course of dealing between the parties, — and in the absence of any authority to the contrary, show that no liability of the respondent, as indorser, to the appellant, as indorsee, arose out of the transaction in question. Several authorities, however, were cited in the argument; and it will be proper to consider such of them as were most relied on as bearing on the question of the liability of an agent, indorser to a principal indorsee. Those which support the general doctrine of the liability of an indorser to an indorsee need not be noticed. It was not disputed, on one side, that such was the general rule; nor, on the other, that it was subject to an exception whenever the contract between the parties should be shown to exclude such liability. Of the authorities relied on for the appellant as showing the liability of an agent, indorser to his principal indorsee, the first was that of Mr. Justice Story (Agency, § 157), whose words, as far as they relate to indorsements of bills, are: "Personal liability

will attach to an agent who indorses a bill generally" (this word is here to be understood as meaning "without describing himself as agent"); "for in such a case the indorsing of the instrument is treated as an admission that it is his personal act, not only in respect to third persons, but also in respect to his principal." This is the language of the text. In a note, after citing six cases, four of which are cases between the agent and a third person, not his principal, the remaining two being Le Fevre v. Lloyd and Goupy v. Harden (to be presently noticed), the learned author proceeds: "But see Kidson v. Dilworth.[1] In respect to the principal, the doctrine may, in many cases, require to be qualified; for if, as between him and his agent, there was no intention to create a personal liability, it will not arise." The authority of the learned writer, therefore, appears to be clearly in favor of the absence of liability, where there is no intention to create it.[2] . . . In this case, the drawer of the bill had been employed as broker to sell the goods: having done so, he had completely executed his authority. The bill at two months, for which he had sold, meant, as the defendant himself contended, a bill drawn by the vendor on the purchaser. In drawing the bill himself, the broker acted without authority, in excess of his duty; and the plaintiffs, on receiving the bill with his name on it, had a right to treat him as an ordinary drawer, nothing having passed between them authorizing him to act for them in drawing the bill. This case, therefore, has no application to one where a bill is indorsed by an agent in the execution of his duty to his principal.

The other case of Goupy v. Harden was the principal authority relied on by the appellant, and requires a particular examination.[3] . . .

In that case, as in the present, the question was whether an agent who had indorsed to his principal, without restrictive words, was liable to his principal, and that, as in the present case, the liability was treated as depending on the fact whether the parties had evinced an intention that such liability should arise between them; or, in other words, what was the agreement between the parties to be inferred from the facts of the case. The evidence in that case was left to a mercantile jury of the city of London, who, by finding for the plaintiff, decided that, in their opinion, the defendant had contracted with the plaintiff, so as to assume the ordinary liability of an indorser, and the court considered that the evidence was such as to sustain the verdict. In the present case, the court (at which two merchants styled "consuls" assisted) decided that, under the circumstances of the present case,

[1] 5 Price, 564.

[2] The learned judge here stated the facts in Le Fevre v. Lloyd, *supra*, p. 129. — Ed.

[3] The learned judge here stated the facts of Goupy v. Harden, *supra*, p. 130. — Ed

no such contract was shown to have arisen. The jury in that case, and the merchants in the present, must be taken to be cognizant of the usual course of mercantile practice in London and Malta respectively.

It is evident that the decision of the court and jury in that case, and that of the courts of Malta in the present, may both be right, if the circumstances of the two were so different in material respects as to justify a conclusion that in that case there was such a contract, and that in this there was not. It may also be observed that all that the court decided in Goupy *v.* Harden was that the verdict of the jury should not be disturbed. It does not follow that, if the verdict had been the other way, it would have been set aside. Indeed, as it was the case of a mercantile jury deciding a mercantile question on which there were considerations of weight on both sides, it would be according to the usual course to sustain it on whatever side it was. But it will be found, on a close examination, that the facts of the two cases differ very materially. In Goupy *v.* Harden, it appeared that the plaintiffs employed the defendants for a commission of ½ per cent to procure in London bills on Portugal for £1,000, and transmit them to Paris; that the defendants purchased the bills on the Exchange, and, having specially indorsed them to the plaintiffs, transmitted them to Paris; that the plaintiffs indorsed and negotiated the bills (which were payable after sight) without presenting them for acceptance; that the bills were not presented till long after they might have been presented, and were then dishonored, and the plaintiffs compelled to pay them.

In that case, there was no evidence of any course of dealing between the parties, nor of any communication by the defendants to the plaintiffs, accompanying the transmission of the bills to the plaintiffs. The plaintiffs do not appear to have had any information respecting the bills, except that they were sent in execution of an order to the defendants to procure bills, and that they bore the unqualified indorsement of the defendants. For any thing that appeared to the contrary, the defendants might have received the bills from the drawers on their own account, in payment of a debt due from the drawers to them, and afterwards indorsed them, in order to transfer the property in the bills to the plaintiffs, in execution of their order to procure bills on Portugal. In such a case, no doubt the defendants would be liable as indorsers; and in the absence of any communication by the defendants to the plaintiffs, accompanying the transmission of the bills, to show that such was not the case, the plaintiffs might naturally infer that the defendants intended to place themselves in the ordinary situation of indorsers, and that the plaintiffs had so understood the transaction was

shown by their conduct in not promptly presenting the bills for acceptance, which they probably would have done, if they had not relied on the defendants as indorsers. In that case, also, the defendants were paid ½ per cent commission for the duty they undertook; *i. e.*, procuring and forwarding the bills.

In the present case, there was a course of dealing between the parties, by which it appeared that the defendant had ½ per cent on money collected by him, but no commission in respect of procuring and remitting bills. The bills were forwarded by the respondent on the days on which they were drawn, in letters mentioning the receipt of funds of the appellant, which he had directed the respondent to remit by bills on London, stating that he had bought the bills enclosed; with respect to the larger bill, using the words, "bought for you," and sufficiently intimating the same with respect to the other, and in both debiting the plaintiff with the prices alleged to have been given for the bills. These letters, therefore, in effect represent the bills as having been bought for the plaintiff in pursuance of his direction, with his funds, and therefore as having become his property by the purchase before the indorsement by the defendant. The plaintiff having received the bills, with notice of this state of facts, without objection, must be taken to have been willing to take them on the terms of such a contract as would arise out of an indorsement made under such circumstances. Having so received them, he promptly presented them for acceptance, though, being drawn payable after date, this was not needful, except to obtain security of the drawee: this, indeed, was a step which might properly be taken, whether the plaintiff considered the defendant as liable on his indorsement or not. But it is material in comparing the facts of the present case with those of Goupy *v.* Harden, in which great reliance was placed by the court, and probably by the jury, on the non-presentation for acceptance, as showing that the plaintiff in that case considered the defendant as liable on the indorsement.

It is not necessary to notice particularly those cases, such as Leadbitter *v.* Farrow,[1] cited for the appellant, in which the question was, whether the defendant, who was agent, not to the plaintiff, but to a third person, was personally liable to the plaintiff on a contract: these cases have no material application to the present case, in which the question is, how far the defendant's character of agent to the plaintiff affects his liability.

On the part of the defendant, several authorities were cited which may now be considered. The case of Kidson *v.* Dilworth[2] was one

[1] 5 Man. & Sel. 345. [2] 5 Price, 564.

very much like the present. There the agent, Kidson, the plaintiff in equity, had received for his principal, Welsh, a defendant in equity, a bill payable to his (the agent's) order, and had indorsed it to his principal. An action was brought on behalf of the principal by the defendant Dilworth, on this indorsement. The Court of Exchequer restrained it by injunction, on the ground that the principal had no right to claim payment of the bill from his agent. Richards, Chief Baron, says: "Shall he [the indorsee] be permitted to proceed, through the medium of another person, against a mere agent, because that agent has imprudently put his name on the instrument to satisfy a formality, made necessary by the mode of drawing it? It is impossible." Graham, Baron, adds, "The plaintiff's letter was acquiesced in and acted on, and this bill was sent in consequence: it was a natural mode of remittance; it was also natural that the draft should have been made payable to the plaintiff, but still it was merely as an agent to Welsh, and it was indorsed by him in that character." Wood, Baron, says, "The bill was clearly made payable to the plaintiff in his character of agent; and it was therefore necessary that he should indorse the bill *pro forma:* having done so, merely for the accommodation of the defendant, a court of equity ought not to suffer him to turn round on the agent, and fix him with liability on such an indorsement. Had he indorsed the bill to guarantee the payment, it would have been a very different case; but here it is clear that nothing of the kind was meant, nor was there any consideration for his so doing: the nature of the transaction is very clear."

In this case, the proceeding was in equity; but the reasons given by the court show that, in their opinion, the facts of the case showed that it was not the intention of the parties that the indorser should be liable to the indorsee under his indorsement, and, when that is the case, there is no implication of a promise to pay, and no legal liability out of which such promise would arise. The written indorsement is, indeed, unqualified in its terms; but the delivery to the indorsee from which, together with the written indorsement, and not from the written indorsement alone, the contract between the parties is to be inferred, is so circumstanced as to show that the indorser does not make himself liable to his indorsee. This is a defence at law, though a Court of Equity may have a concurrent jurisdiction. No question of jurisdiction was raised; and the plaintiff might prefer a proceeding in equity on account of the action being brought by a third party, and from the superior facilities he would have in equity for establishing his case.

This case is, therefore, an authority of great weight in favor of the respondent; and there are some foreign authorities also in his favor

which deserve to be considered. In Merlin's Questions de Droit, p. 676, Endossement, "Le banquier commissionaire qui endosse la lettre de change qu'il achète sur la place pour son commettant, se rend-il par là garant envers celui-çi de la solvabilité de la personne sur laquelle cette lettre de change est tirée? La Cour de Cassation a jugé pour la négative dans l'espèce suivante." The book then gives a report of a case of Meulemeester v. Tourton and Ravel, fully supporting the above proposition.

Dalloz's Dictionnaire de Jurisprudence, tom. ii. p. 245, art. 407: "Lorsque le cessionnaire chargé de se procurer des effets pour un cor respondant les lui transmet avec son endos, cet endossement n'est alors entre les parties que la suite d'un mandat et ne peut avoir d'autres conséquences."

Baldasseroni, an eminent Tuscan jurist,—Dictionario, tom. iii. p. 353, tit. Gira, § 26, — in treating of indorsements which do not render the indorser liable to the indorsee, after mentioning the case of a principal who indorses to an agent, to enable him to receive the amount of the bill on account of the principal, proceeds to put the case of an agent who, having bought a bill on account of his principal, transmits it to him with a regular indorsement (that is, an indorsement sufficient in form to pass the property, and to charge the indorser as such), "not by way of transfer (*cessione*), because no one can acquire that which belongs to him, but as a species of declaration of the order, and because it is just to put this bill into the hands and at the disposition of its true proprietor." In this case, says the learned author, the principal cannot, on failure of payment, exercise an action of warranty against his agent who indorsed for his benefit.

Their lordships, therefore, on considering the facts of the case, and the arguments and authorities presented to them on the subject, are of opinion that the respondent is not shown to have incurred the liability with which he is charged, and must humbly advise her Majesty that the judgments of the courts at Malta be confirmed.[1]

[1] Kidson v. Dilworth, 5 Price, 564; M'Donough v. Goule, 8 La. 472; Lewis v. Brehme, 88 M'd. 412; Mechanics' Bank v. Earp, 4 Rawle, 384; Sharp v. Emmet, 5 Whart. 288; Shelton v. Hurd, 7 R. I. 403 (*semble*); Chaddock v. Vanness, 35 N. J. 520 (*semble*), *accord*.

See Heubach v. Mollmann, 2 Duer, 237, 260. — Ed.

MACGREGOR v. C. H. RHODES, J. LANE, AND C. H. RHODES.

IN THE QUEEN'S BENCH, APRIL 25, 1856.

[*Reported in 6 Ellis & Blackburn, 266.*]

THE first count of the declaration charged that, on 1st November, 1854, one G. E. Pinkney, by his bill of exchange now overdue, directed to one T. E. Lane, required the said T. E. Lane to pay to the order of the said G. E. Pinkney £1,800, six months after the date thereof; and the said G. E. Pinkney indorsed the same to the defendants, who indorsed the same to the plaintiff; and the said bill was duly presented for payment, and was dishonored, of which the defendants had due notice, but did not pay the same. (There were other counts.)

Plea (1st) to the first count: "that the said bill was not indorsed to these defendants as alleged."

Demurrer. Joinder.

Phipson, for the plaintiff. The defendants are not entitled to insist on the defence which the plea sets up. They do not deny their own indorsement to the plaintiff; and he has taken the bill on the faith of that indorsement. It is not suggested that the plaintiff has not given value to the defendants. [ERLE, J. Do you say that the indorsement to the defendants is not essential to the negotiability of the bill?] As between the present parties, the question of negotiability does not arise. [LORD CAMPBELL, C. J. The bill requires payment to the order of Pinkney. Must you not show that there is such order giving you the right?] That must be done; but the defendants, by indorsing, admit that right. When the acceptor is sued, he admits only the handwriting of the drawer; and, therefore, the title derived from the drawer may be impeached by him. But that is inapplicable to the case of an action brought by an indorsee against his immediate indorser. On the effect of an indorsement, as admitting the prior indorsements, the authorities are uniform. Bomley *v.* Frazier,[1] Lake *v.* Hayes,[2] Heylyn *v.* Adamson, Lambert *v.* Oakes, Critchlow *v.* Parry,[3] and note to that case; Free *v.* Hawkins; Bayley on Bills, 463 (ed. 6); Byles on Bills, 118 (ed. 6); Chitty on Bills, 646 (ed. 9); Story's Commentaries on the Law of Bills of Exchange, § 111, p. 125 (ed. 1843). [ERLE, J. Suppose the plaintiff to have indorsed to the defendants, and that they had indorsed over to him.] That would not, by the

[1] 1 Stra. 441 [2] 1 Atk. 281 [3] 2 Camp. 182.

custom of merchants, entitle the plaintiff to sue the defendants. Brit ten v. Webb. But such a transaction cannot be presumed to have taken place here, in the absence of express allegation. [LORD CAMPBELL, C. J. Assuming that, if issue were joined, the defendants, at the trial, would be bound conclusively as to the fact by their admission, does it follow that the plea is bad?] The two questions are really the same. It may be true that the bill came to the defendants without a genuine indorsement; but they, having indorsed, cannot set up this. [ERLE, J. They might perhaps be liable as drawers. Intermediate indorsements need not be noticed at all. CROMPTON, J. But you must recover *secundum allegata.*] If the defendants are estopped from disproving the indorsement, the plaintiff cannot injure his claim by alleging it. In Chitty on Bills, 572 (ed. 9), it is said, "It has been decided that in an action against the indorser of a bill of exchange, in which the declaration stated several prior indorsements, it is not necessary to prove any indorsements on the bill prior to the defendant's, though it is otherwise in an action against the acceptor: consequently, where a remote indorser is sued, there will be no risk in stating all the prior indorsements in the declaration." [CROMPTON, J. There is no doubt as to that; but the question is whether the defendants may not traverse your allegation of indorsement.] In Armani v. Castrique,[1] though the marginal note appears to state the law in favor of such a plea, there really was no decision on the point; but an amendment was suggested and made.

Karslake, contra. The plaintiff has chosen to aver specifically how he has obtained a title to the bill; and therefore he has made the particular title traversable. Whether, on a traverse, the indorsement by the defendants would prove an indorsement to them is a very different question. In Sanderson v. Collman,[2] it was held that the acceptor was estopped from traversing the fact of the drawing *modo et forma;* but there the estoppel was replied, which ought to have been done here, if there be an estoppel. [LORD CAMPBELL, C. J. What could the plaintiff do beyond repeating his own declaration?] He might reply that there were no intermediate indorsements, and that the name of the G. E. Pinkney appeared on the bill as indorser. Or he might, in the declaration, have stated that the defendants indorsed a bill purporting to be drawn by G. E. Pinkney, and indorsed by him to the defendants, as suggested by Parke, B., in Armani v. Castrique.[1] [CROMPTON, J. There may be an estoppel here as to all that appears on the bill, but I do not know what it is that does appear on the bill. WIGHTMAN, J. In Armani v. Castrique, the court say: "There can be no doubt that, if the matter of estoppel appears upon

[1] 18 M. & W. 449, 450. [2] 4 M. & G. 209.

the pleadings, then it is not necessary to reply the estoppel, but the party may avail himself of it on demurrer."] It is, however, plain that the court there held that the pleadings did not show the matter of estoppel, so as to bring the case within that rule.

Phipson, in reply, referred to Penny v. Innes.

LORD CAMPBELL, C. J. I am of opinion that the plea is naught, and that the plaintiff is entitled to judgment. The declaration alleges that Pinkney drew a bill payable to his order, and indorsed it to the defendants, and that the defendants indorsed it to the plaintiff, and that it was presented and dishonored. The plea admits all these allegations, except the allegation of the indorsement by Pinkney to the defendants. Are the defendants, who admit that they indorsed to the plaintiff, at liberty to deny that Pinkney indorsed to them? The issue would be idle. Whether Pinkney indorsed to the defendants in blank or specially, the fact of the indorsement by the defendants would at the trial be conclusive evidence of Pinkney's indorsement to them, and would estop them from showing that what purported to be Pinkney's indorsement was a forgery. The request is to pay to the order of the payee. When a man indorses such a bill, he undertakes that, if the party requested do not pay, he will; and he cannot deny that the payee has made the order. This is established by a long string of authorities.[1] I cannot think that any replication was necessary to raise the estoppel. The plaintiff could reply only the matter already shown by the declaration, namely, that the defendants indorsed to him; and that is, of itself, an estoppel. The defendants having, when they handed the bill to the plaintiff, represented the title as a just one, cannot now deny that it is so. With respect to Armani v. Castrique, I should pay the most sincere respect to a decision of the Court of Exchequer; but, as to what was said *obiter* on the suggestion of an amendment, I think it is not entitled to an equal consideration. My brother Parke appears to have recommended a new form of declaring, in all such cases, against the indorser, by alleging that the defendant indorsed a bill purporting to be indorsed to him by the party entitled to indorse; but he could hardly have meant that such a form was indispensable for raising the estoppel; at any rate, if he did,

[1] Critchlow v. Parry, 2 Camp. 182; Chaters v. Bell, 4 Esp. 210; Whittemore v. Herbert, 2 Cranch, C. C. 245; Woodward v. Harbin, 1 Ala. 104; Mills v. Barney, 22 Cal. 248; Codwise v. Gleason, 8 Day, 12; Bestor v. Walker, 9 Ill. 8; Olivier v. Andry, 7 La. 496; Condon v. Pearce, 43 Md. 83; State Bank v. Fearing, 16 Pick. 533; Central Bank v. Davis, 19 Pick. 376; Howe v. Merrill, 5 Cush. 80; Murray v. Judah, 6 Cow. 484; Troy Bank v. Lauman, 19 N. Y. 477; Case v. Bradburn, 1 Daly, 256; Turnbull v. Bowyer, 40 N. Y. 456; Weakly v. Bell, 9 Watts, 273; Harris v. Bradley, 7 Yerg. 310, *accord*. — ED.

this intimation would not be sufficient to impeach the authorities which have hitherto regulated the pleadings in such cases.

WIGHTMAN, J. The defendants admit that they indorsed a bill payable to the order of Pinkney; but they deny that Pinkney indorsed to them. I think they are not entitled to take such a traverse, and that the issue is immaterial. The plaintiff could not recover without an averment of Pinkney's indorsement; for that is essential to the negotiability. Some little doubt has been suggested from the expressions used in Armani *v.* Castrique; but nothing was said there sufficiently urgent to induce us to determine contrary to the authorities.

CROMPTON, J. We are now for the first time deciding this point; for none of the authorities touch it. There are plenty of authorities to show that the estoppel must in the ultimate result prevail. But the question is whether the defendants are estopped from traversing the mode in which the plaintiff alleges his title. He alleges that Pinkney indorsed to the defendants; and he must recover *secundum allegata et probata.* The question, therefore, is, not whether the defendants can dispute the plaintiff's right generally, but whether they can dispute this peculiar right. I incline to think that they may. If they cannot, we should probably have found in the books some demurrer to such a plea. The plaintiff says that Pinkney indorsed to the defendants; and he can prove this only by showing a special indorsement to them, or a blank one, by Pinkney. In cases of either sort of indorsements, the holder may strike out intermediate indorsements, and declare on the indorsement of a single party. But there is another case, which gives rise to my doubt. Suppose the bill indorsed specially by several successive parties, and the declaration to trace the bill through all the indorsements. If the defendants are estopped here, they would be estopped from denying the steps necessary for tracing the bill in the case I have supposed. But I think that the estoppel goes no further than to prevent the defendants from saying that the plaintiff has no title, and not to the extent of preventing them from saying that he has not the particular title alleged.

My brother Erle, who has just left the court, agrees with my lord and my brother Wightman. *Judgment for the plaintiff.*[1]

[1] See Armani *v.* Castrique, 13 M. & W. 443; Van Staphorst *v.* Pearce, 4 Mass. 258.

Conf. E India Co. *v.* Tritton, 3 B. & C. 280. — ED.

SUSE AND OTHERS v. POMPE AND ANOTHER.

IN THE COMMON PLEAS, MAY 5, 7, JUNE 5, 1860.

[*Reported in* 30 *Law Journal Reports, Common Pleas*, 75.[1]]

THE first count of the declaration stated that certain persons, by the name of E. Busch & Co., by their bill of exchange, dated at Liverpool, the 21st day of February, in the year of our Lord 1859, directed to one Carl Von Thornton, at Vienna, in parts beyond the seas, required the said Carl Von Thornton to pay that their first of exchange (second and third not paid) to the order of them, the said E. Busch & Co., the sum of £750 sterling, at the exchange, as per indorsement, four months after date, which had elapsed before action, and the said E. Busch & Co. also made their second of exchange of the same date and tenor, and indorsed the second of exchange to the defendants, by the name of Messrs. Wilk, Bunge, & Co., or order, and also delivered to them the said first of exchange; and the defendants, by that name, indorsed and delivered the said second of exchange to the plaintiffs, at the exchange of 11 florins 5 cents new Austrian currency per pound sterling value of the same, as per indorsement thereon, and also delivered to the plaintiffs the said first of exchange, and the said first of exchange was accepted by the said Carl Von Thornton, and the same, together with the said second of exchange, so indorsed as aforesaid, was afterwards duly presented to the said Carl Von Thornton, at Vienna aforesaid, for payment and was dishonored; nor did the said Carl Von Thornton pay the said second or third of exchange, whereupon the said bill was then duly protested for non-payment thereof, of all which the defendants had due notice; that the amount of the said bill at the said exchange of 11 florins 5 cents was the sum of £750, and that the plaintiffs have incurred expenses in and about the noting and protesting of the said bill and for brokerage and postages incidental thereto. Breach, non-payment of the said sum of money and expenses respectively.

The second count was similar to the first, except that the amount of the bill of exchange, at the like exchange of 11 florins 5 cents, was £490 11*s*. The rest of the declaration consisted of the ordinary money counts, for money lent, for money received, and for money due on accounts stated.

The defendants pleaded a tender of £952 12*s*. 9*d*., being, as they alleged in their plea, the whole of the amount ever due and payable

[1] 8 C. B. N. S. 538, S. C. — ED.

by the defendants to the plaintiffs in respect of the several causes of action in the declaration mentioned.

The plaintiffs, by their replication, traversed the tender; and also, secondly, replied that at the time of such tender there was, and had always since been due and owing to the plaintiffs from the defendants, a larger sum than £952 12*s.* 9*d.* in respect of the said causes of action.

Issue was joined upon both the plaintiffs' replications.

The cause was tried before Erle, C. J., at the London sittings after Michaelmas term, 1859, and the only question was the amount for which the defendants were liable as indorsers of the bills of exchange in the action. The bills were drawn at Liverpool in pounds sterling, as stated in the declaration, at the exchange indorsed thereon, and the result of that, according to the evidence, was as if each had been a bill for so many florins as the pounds would have amounted to. In the case of the purchase of London bills on Vienna, the florins would, according to the usual course of practice, have been put into the bills; but with respect to Liverpool or country bills purchased in London, such as were the bills in question, the amount for which they were drawn would be in English money, and the rate of exchange at which the pound sterling should be fixed would be indorsed at the back of the bill.

The amount of the tender pleaded, and which the defendants paid into court, was sufficient to cover the number of florins which the acceptor of the bills would have had to pay, if he had paid them at maturity, together with interest and the necessary expenses arising from their dishonor; and it was contended on behalf of the defendants that they were not bound to pay more.

The value of the florin having fallen between the indorsing of the bills to the plaintiffs and their becoming due, the plaintiffs claimed the price they paid for the bills when they were indorsed to them; and they gave evidence of a usage in London entitling the holder of a dishonored bill, like the bills in question, to the option of demanding either the amount of the re-exchange (which would be taking the value of the florin at the time of the maturity of the bill), or the price given for the bill.

The admissibility of evidence of such usage was objected to by the defendant's counsel.

The learned judge, however, received the evidence, reserving leave to the defendants to move to enter the verdict for them, if the court should be of opinion that such evidence was not admissible.

Evidence negativing such usage was given by the defendants, but the jury found a verdict for the plaintiffs for £315.

A rule *nisi* was afterwards obtained to set the same aside and enter

it for the defendants, pursuant to the leave reserved, or for a new trial, on the ground of the verdict being against the evidence as to the existence of the custom. Against this rule

Bovill and *Cleasby* (May 5, 7) showed cause.[1]

Lush and *Honyman*, in support of the rule.

Cur. adv. vult.

BYLES, J. (June 5) delivered the judgment of the court. We are of opinion that the rule to enter the verdict for the defendant must be made absolute. The main question in this case is this. When a bill drawn and indorsed in England and payable abroad is dishonored by the acceptor's non-payment, what is the extent of the indorser's liability to the holder? The defendants contend that the holder is entitled to the amount of the re-exchange, and to neither more nor less. This amount they have paid into court. The plaintiffs, on the other hand, contend that the holder is entitled, at his option, either to the amount that he gave for the bill in England or to the re-exchange. The solution of this question depends on the contract of the indorser. That contract is an engagement by the indorser that, if the drawee shall not at maturity pay the bill, he, the indorser, will on due notice pay the holder the sum which the drawee ought to have paid, together with such damages as the law prescribes or allows as an indemnity. Such also is the indorser's contract as understood in America. Story on Bills, § 107. Apply this contract to the present case. The holder is entitled to receive a certain number of Austrian florins in Vienna on the day when the bill is at maturity. He has, in effect, bought from the indorser so many Austrian florins to be received in Vienna on that day. It should seem to follow that, on non-payment by the drawee, the holder is entitled as against the indorser to as much English money as would have enabled him in Vienna on that day to purchase as many Austrian florins as he ought to have received from the drawee, and further to the expenses necessary to obtain them. The most obvious and direct mode of obtaining that English money is to draw in Vienna on the indorser in England a bill at sight for as much English money as will purchase the required number of Austrian florins at the actual rate of exchange on the day of dishonor, and to include in the amount of that bill the interest and necessary expenses of the transaction. The whole amount is called in law Latin *recambium*, in Italian *ricambio*, in French and English re-exchange. The bill itself is called in French *retraite*. This bill for re-exchange being negotiated at Vienna puts into the pocket of the holder at the proper time and place, the exact sum which he ought to have received from the drawee.

[1] The arguments of counsel have been omitted. — ED.

On this bill for the re-exchange, the holder, of course, has not at Vienna the acceptance of the indorser on whom it is drawn, but holds as his security the original bill, with the indorser's indorsement thereon. If the indorser pays the re-exchange bill, he has fulfilled his engagement of indemnity: if not, the holder sues him on the original bill, and will be entitled to recover in that action what the indorser ought to have paid; that is to say, the amount of the re-exchange bill.

Although in English practice, the re-exchange bill is seldom drawn, yet the theory of the transaction is, as we have above described it, and settles the principle on which the damages are to be computed, although no re-exchange bill be in fact drawn. If the indorser were held liable for the amount which his indorsee gave for the bill when that amount is more than the drawee ought to have paid, the contract of the indorser would be extended, and he would be held liable, not merely for the damages sustained by the breach of the contract, but for the damages sustained by the making of the contract; for a portion of those damages the holder must have sustained, though the contract had been performed by the drawee paying the bill. In effect, the holders here attempt to treat the contract as rescinded. But the consideration has not failed. They have what they bought, that is to say, a genuine bill, and now seek to treat it as if a forged bill had been imposed upon them. If the value of the Austrian florin as compared with the pound sterling had risen instead of fallen, the holders would have gained by the re-exchange. It would be inequitable if they were entitled to the gain, where there is gain, and not liable for the loss where there is loss. Suppose the transaction had been a domestic one, and that the question had arisen on an inland bill. A bill, for example, is drawn for £500 in London on Liverpool, and a purchaser, for many reasons which may be imagined, gives £510 for that bill. The bill is dishonored at maturity: is not his indorser liable to the holder for £500 and interest and no more? And how, on the plaintiff's principle, could the damages be estimated, if there were several indorsers' names on the back of this foreign bill? Is each indorser to refund the money which he received for the bill, though it should happen to be more than the holder gave? or is the holder to recover against any one indorser the money which he, the holder, gave, though it be more than the indorser received? The practice of drawing the *ricambio* bill has been established for many years, not only in case of dishonor by non-payment, but in the case of dishonor by non-acceptance. Heineccius, writing in the early part of the last century, says: "Præsentans non acceptatis litteris cambialibus à tertio mutuam sumit pecuniam et pro eâ litteras cambiales trassat ad trassantem. Quum vero id sine impendiis fieri nequeat damnum illud omne repetitur sub nomine re-

cambii." Heineccius, De Camb. cited in Story on Bills, § 400, note. Pothier, Contrat de Change, § 64, describes the same process in the case of dishonor by non-payment. See also Kent's Commentaries, vol. 3, pp. 115, 116, and Story on Bills, § 400. The amount for which the indorser is liable in the case of dishonor by non-payment would seem therefore to admit of no doubt, were it not for a passage cited by the plaintiff's counsel from Pothier, and another from the Brussels edition of Pardessus. The passage, however, from Pothier, Contrat de Change, § 58, merely applies to the contract of exchange generally, and imports that the drawer contracts with the payee that, in the event of the bill not being paid, the payee shall, at his option, have damages (*dommages-intérêts*) or the restitution of the sum given by him for the bill. This passage on the general law certainly does not accord with our law on the subject, and possibly may be founded on some technical rule of the civil law. But in section 64, coming to the precise question now before the court, Pothier says expressly that the sum for which the *ricambio* bill may be drawn is the sum borrowed by the holder equivalent to that which he ought to have received from the drawee, and that if in addition to the amount of this bill the holder pays the lender what he calls "*un droit de change*," the holder is to be reimbursed this charge by his indorser. The passage cited from the Brussels edition of Pardessus, and which is also to be found in the Paris edition of the same date, is corrected in the subsequent Paris edition. For these reasons, we think the law is clear that the holders of the bill on which this action is brought are entitled to recover no more than the re-exchange; that is to say, the value of the Austrian florins payable in Vienna, expressed in English money at the rate of exchange on the day of dishonor, with interest and expenses.

The next question is this: was evidence admissible to prove a different custom among merchants in London, that is to say, a custom that the holder is entitled, at his election, to recover either the amount of the re-exchange, or the sum which he gave for the bill? We think evidence of such a custom inadmissible. Customs of trade consistent with the terms of a written mercantile instrument may be admissible, "tacite inesse videntur quæ sunt mores et consuetudines." But, if we are right on the question as to re-exchange, the alleged custom is a custom which contradicts the instrument. If, as we conceive, the law-merchant on this subject is settled, then the obligation of the indorser, in the event of non-payment by the drawee, to pay the re-exchange and expenses, is as clearly implied as if it had been expressed. It is, for example, as much implied as the right of the indorser to notice of dishonor, or the right of an English acceptor to days of grace on a bill accepted payable after date or after sight. But evidence of a custom

not to give notice of dishonor, or not to allow days of grace, would certainly be inadmissible. It is unnecessary to add any observation on the want of certainty in the alleged custom, when it comes to be applied to successive indorsers. The rule, therefore, to set aside the verdict for the plaintiffs and enter the verdict for the defendants must be made absolute. *Rule absolute* [1]

HIRSCHFELD v. SMITH.

In the Common Pleas, May 2, 4, 1865, January 12, 1866.

[*Reported in* 35 *Law Journal Reports, Common Pleas*, 177.[2]]

This was an action on a bill of exchange. The declaration alleged that one Lion, by his bill of exchange now overdue, directed to one Pollagot, required the latter to pay to his order £250 three months after date; that the said Lion indorsed the bill to the defendant, who indorsed it to the plaintiff; that the bill was duly presented for payment and dishonored, whereof the defendant had due notice, but did not pay the same. There was also the common money count for money paid, money lent, and on accounts stated.

The defendant pleaded to the first count that he had not due notice.[3]

The material facts which appeared at the trial were these: the bill was drawn by Lion in London, payable to his order, and was directed to and accepted by Pollagot in Paris, payable there; it was indorsed by Lion in blank and delivered to the defendant in London, and by him indorsed in blank and delivered to the plaintiff in London, and by him indorsed and delivered to one Berlé in Paris. The bill was duly presented for payment to Pollagot in Paris, and was dishonored. The holder then took all the steps required by the French law, in order to enable him to recover against the other parties to the bill; *i. e.*, the bill was duly protested at the proper office, and a copy of the protest sent to the French consul in London, who, in due course, according to

[1] De Tastet *v.* Baring, 11 East, 265 (*semble*); Bank of U. S. *v.* Daniel, 12 Pet. 32; Bank of U. S. *v.* U S., 2 How. 711; Campbell *v.* Swasey, 12 Ind. 70 (*semble*); Graves *v.* Dash, 12 Johns. 17; Denston *v.* Henderson, 18 Johns. 322; Hargous *v.* Lahens, 8 Sandf. 218 (criticising Bangor Bank *v.* Hook, 5 Greenl. 174); Butt *v.* Hoge, 2 Hilt. 81, *accord*.

See also Slacum *v.* Pomery, *infra*, p. 201, n. 1. — Ed.

[2] L. R. 1 C. P. 340, s. c. — Ed.

[3] Only so much of the case is given as relates to this plea. — Ed.

French law, gave notice to the defendant. The notice was clearly good according to the French law, clearly bad according to English law.

A verdict was entered for the defendant, under the direction of the learned judge, on the grounds that the notice of dishonor was bad; with leave to the plaintiff to move to set aside the verdict, and enter it for himself for the amount claimed.

A rule having been obtained pursuant to such leave (though, by mistake, drawn up in an incorrect and too restricted form),

H. James and *Harington* showed cause. It is admitted that the bill was duly protested, and that the notice of dishonor was good by the law of France, but was bad according to the law of England; and it is submitted that this is an English bill, as to the indorsement, and that, if so, there is not a proper notice of dishonor. It is submitted that each indorsement was a new bill, — a contract of indemnity; and that this contract being in England is a contract of guarantee by English law. It is admitted that Rothschild *v.* Currie is an authority the other way; and that the only distinction is that there the bill was accepted on its face payable in Paris, whereas here it is open, and also (as we say) was sent for collection to Paris. In the case of Gibbs *v.* Fremont, the case of Rothschild *v.* Currie is referred to as doubtful, and in Allen *v.* Kemble[1] it is disapproved of. Again, Mr. Justice Byles, in his treatise on Bills of Exchange, 8th ed., 372, thus refers to Rothschild *v.* Currie: "It has even been held, but perhaps erroneously, that not only the protest, but the notice, must be regulated by the law of the country where the bill is payable." This question is also discussed in Chitty on Bills (edition of 1859), 172, and in Story on Bills (§ 296, and the notes to that section), and also in Story's Conflict of Laws. M. Demangeat, in his treatise Traité de Lettres de Change, states that the law of England governs an indorsement made there, and makes an indorsement which is good there also good against an acceptor in France. Any other construction would lead to great inconvenience, as the indorsee cannot well know the law of another country.

E. James and *Tapping*, in support of the rule. There is no conflict of authority. In Gibbs *v.* Fremont, the question was simply on what rate of interest the damages were to be calculated against the drawer in case of non-acceptance. The acceptor's engagement is to pay in France, and the indorser engages, on non-performance by the original debtor in France, to pay himself in England. Rothschild *v.* Currie is in point. First, it is submitted that this is a French bill as against the indorser. Lord Mansfield, in the case of Robinson *v.* Bland,[2] said: "The general rule established *ex comitate et jure gentium* is that the

[1] 6 Moo. P. C. 314.

[2] 1 W. Black. 258.

place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, where the parties at the time of making had a view to a different kingdom;" and here at the time of indorsement it was contemplated that the contract should be fulfilled in France.

[BYLES, J. It is said in Allen v. Kemble, "Since the cases above referred to were decided, the whole law on this subject has been most carefully, elaborately, and learnedly examined by Mr. Justice Story, in his treatise on Bills of Exchange, and he disapproves of the decision in Rothschild v. Currie."]

Where a contract is made in one country to be performed in another, the latter is deemed the country where it is made. Byles on Bills, 370; Story on Bills, § 129; the judgment of Lord Brougham in Don v. Lippmann.[1] [They further referred to Nouguier, Des Lettres de Change; Les Codes Annotés, de Sirey, par Gilbert; and Dictionnaire des Lois, par Chicoisneau.] As to the argument from inconvenience, it cuts both ways, and is rather in favor of our construction, as it would be highly inconvenient that the holder should have to ascertain where every indorsement was made, and the law of those places. He cannot tell where the indorsements were made: the proper time may elapse from no default; and, indeed, the bill might be indorsed where there was no law on the subject. *Cur. adv. vult.*

The judgment of the court[2] was now (January 12) delivered by

ERLE, C. J. In this action by the holder against the indorser, the defendant relied on two grounds of defence: first, that he had not received due notice of dishonor; and, secondly, that the bill was rendered void by alteration. As to the first ground, the facts were that the bill was drawn in England, payable to the drawer's order, directed to and accepted by the drawee in France, payable in France, and was indorsed by the drawer in blank and delivered to the defendant in England, and by him indorsed in blank and delivered to the plaintiff in England, and indorsed by the plaintiff and delivered to one Berlé, in France. The bill was duly presented in France and dishonored, and the holder took the steps required by the law of France to entitle him to recover from the other parties to the bill. That is to say, the bill was taken to the proper office and a due protest was made, and a copy of the protest was transmitted to the consul of France in the foreign country where the party to the bill was residing; that is to say, as respects this defendant, to the French consul in London, and by that consul the protest was in due course, according to the French

[1] 5 Cl. & F. 1.

[2] Erle, C. J., Byles, Keating, and Smith, JJ.

practice, made known to the defendant without delay. If the action on the bill had been brought in France, upon an indorsement made in France, these facts would have amounted to such notice of dishonor as the law of France requires, and would have entitled the plaintiff to recover. As this action was brought in England, against an indorser indorsing in England, the present question is whether these facts are evidence of due notice of dishonor against this defendant in an action brought in England.

Our answer is in the affirmative, on two grounds: first, because the point has been decided in Rothschild *v.* Currie, where the bill was drawn, accepted, indorsed, and dishonored under circumstances similar to those relating to the present bill, and the facts adduced to show notice of dishonor were also similar, and were decided to be sufficient, because they were sufficient according to the law of France. Secondly, if the reason assigned in that case be not now adopted, and if the contract of an indorser in England of a bill accepted payable in France be held to be a contract governed by the law of England, and so the holder be not entitled to sue in England such an indorser, unless he has given due notice of dishonor, according to the law of England, then the question is, what notice, under such circumstances, amounts to due notice. If the parties lived in England, and their addresses were known, the rule is that notice should be sent by the post on the day following the day of dishonor. But, in respect of bills dishonored in a foreign country, such a rule cannot always have a literal application, because, among other reasons, the postal regulations may make it impossible. Due notice is such notice as can be reasonably required under the circumstances; and the reasonableness of the notice proved in evidence is a question of law depending on the facts of each particular case, which facts are for the jury. In the course of practice, rules have been recognized by the judges, and so have become law. (See the judgments of Grove, Lawrence, and Le Blanc, JJ., in Darbishire *v.* Parker.[1]) If, by the law of the place where the bill is payable, there are regulations for giving notice of dishonor, in order to make indorsers liable to the holder, a presumption is raised that notice, according to those regulations, is all that the indorser should require. The indorser of a bill accepted payable in France promises to pay, in the event of dishonor in France, and notice thereof. By his contract, he must be taken to know the law of France relating to the dishonor of bills, and notice of dishonor is a portion of that law. Then, although his contract is regulated by the law of England relating to indorsement, and although he may not be liable unless reasonable notice of dishonor has been sent to him, yet the notice of dishonor according to

[1] 6 East, 8.

the law of France may be, and, we think, ought to be, deemed reasonable notice according to the law of England, and be sufficient in England to entitle the plaintiff to recover according to that law. It is reasonable to hold that the foreign holder should have time to make good his right of recourse against all the parties to the bill, in whatever country they may be. Here the holder was a Frenchman in France: the indorsement to him was by the plaintiff, a Frenchman in France; the indorsement to the plaintiff was by the defendant, an Englishman in England; and the indorsement to that Englishman by Lion, the payee, may have been in any country. The inconvenience would be great, if the holder was bound to know the place of each indorsement, and the law of that place relating to notice of dishonor, and to give notice accordingly, on pain, in case of mistake, of losing his remedy; whereas, there would be great convenience to the holder if notice, valid according to the law of the place where the bill is payable, should be held to be reasonable notice for each of the countries of each of the parties, unless an exceptional case should give occasion for an exception. *Judgment for the defendant.*[1]

DENTON v. PETERS.

In the Queen's Bench, July 6, 1870.

[*Reported in Law Reports, 5 Queen's Bench, 475.*]

Bill of exceptions to the ruling of the Assessor of the Court of Passage for the borough of Liverpool, directing the jury to find a verdict for the plaintiff on the ground that there was no evidence to go to them in support of the defendant's pleas.

The declaration was on a bill of exchange for £34 1*s.* drawn by the defendant and accepted by one Jones, and indorsed by the defendant to the plaintiff.

Pleas: 1. That the defendant did not indorse; 2. That the plaintiff was not the lawful holder of the bill.

The facts sufficiently appear from the judgment of the court.

Feb. 12. *R. G. Williams*, for the defendant. It is clear that the facts afford a good defence to the action: the only question, therefore, is, whether they can be given in evidence under the traverse of the indorsement. There was no intention on the part of the defendant to pass the property in the bill, so as to enable the plaintiff to sue him.

[1] The court gave judgment for the defendant, on the ground that the bill was rendered void by an alteration. — Ed.

It might be a good indorsement as against Jones, the acceptor, but not as against the indorser. It is not enough that there should be a writing of the indorser's name, and a delivery, but there must be an intention to pass the property. Marston v. Allen, and this defence may be shown under a traverse of the indorsement. Lloyd v. Howard.[1] There was also evidence to go to the jury that the plaintiff was not the lawful holder as against the defendant. He was a mere trustee of the bill for the purpose of suing Jones, and not for the purpose of bringing an action against the defendant.

C. Russell (*Buchanan* with him), for the plaintiff. The question is not whether there is a defence to the action, but whether it is raised by either of the two pleas. It has never been held that, where a holding of a bill at its inception is lawful, the right to sue is divested by something that happens subsequently. The second plea is applicable to a bill payable to bearer: under it, it may be shown that the bill has been stolen, or that the person suing upon it is not the owner in fact. It has no meaning when pleaded to a bill payable to order. If the defence is that the bill has been transferred for a certain purpose, which has been contravened, that must be specially pleaded. At the time the bill was transferred to the plaintiff, he had an interest in it; and the presumption is that the indorsement was intended to pass the property, and, in order to rebut that presumption, the facts destroying it must be specially pleaded. In Marston v. Allen, the bill, after its indorsement, was delivered merely for safe custody, and there was no intention on the part of the transferror that the transferee, or any person claiming through him, should sue on it. In Bell v. Lord Ingestre, there was no complete indorsement. In Lloyd v. Howard,[1] the bill was indorsed for the purpose of raising money, and there was no intention that the indorsee should sue any one on it. It is not necessary that the plaintiff should be the absolute owner of the bill: it is sufficient if he have an interest in it coupled with possession. The present case falls within the principle laid down in Ancona v. Marks.[2] It is clear that there was no agreement in writing that there should be no recourse to the defendant: a mere parol agreement cannot be pleaded to vary the liability created by the indorsement. Young v. Austen.[3]

[LUSH, J. That case is not analogous: it was an action by the drawer against the acceptor.]

R. G. Williams replied. *Cur. adv. vult.*

July 6. The judgment of the court (MELLOR, LUSH, and HANNEN, JJ.) was delivered by

MELLOR, J. This was an action in the Passage Court of Liverpool

[1] 15 Q. B. 995. [2] 7 H. & N. 686. [3] Law Rep. 4 C. P. 553.

on a bill of exchange for £34 1s., drawn by the defendant and accepted by one Edward Jones, and indorsed by the defendant to the plaintiff.

The defendant pleaded that he did not indorse, and that the plaintiff was not the lawful holder of the bill.

At the trial, the plaintiff produced the bill sued on, and proved that the name of the defendant indorsed on it was in the handwriting of the defendant.

The defendant then gave evidence of the following facts: The plaintiff and the defendant were partners in a speculation in currants. The defendant bought the currants, and paid for them, and re-sold them at a profit to Jones, who gave to the defendant the bill declared on in payment. The original price of the currants was settled in account between the plaintiff and defendant, and the defendant held the acceptance until maturity, when it was presented and dishonored.

If the bill had been paid by Jones to the defendant, the latter would have been bound to hand over half of the proceeds to the plaintiff; but, as it was not paid, the defendant, who had before presentment indorsed his name on the bill, handed it to the plaintiff, and requested him to try to obtain payment from Jones, stating that Jones would be more likely to pay the plaintiff. If the plaintiff had obtained payment of the bill, he would have been bound to hand over half the proceeds to the defendant. Jones did not pay the bill to the plaintiff, and the plaintiff afterwards brought the present action against the defendant.

It was not denied on behalf of the plaintiff that these facts, if proved, established a defence to the action; but it was contended that they could not be given in evidence, unless specially pleaded. We, however, are of opinion that they support the plea denying the indorsement to the plaintiff.

As against the acceptor, this would, no doubt, have been a valid indorsement. All that is necessary to give a good title as against him is the writing of the name of the holder, and a manual delivery of the bill, with intent to transfer the property in it to the indorsee, as between him and the acceptor. But, as between indorser and indorsee, there must be the additional element of an intent to stand in the ordinary relation of indorser; that is, to guarantee the payment, if the acceptor makes default.

If the defendant, after writing his name on the bill, had delivered it to a person, as his agent, to collect the money, that would not have amounted to an indorsement so as to charge the principal at the suit of the agent; and the fact that the plaintiff was not a mere agent, but had himself an interest in the debt for which the bill was given, does not make any difference. The intention of the parties was not

that the plaintiff should become the sole owner of the bill as against the defendant, but that he should hold it for the joint benefit of himself and the defendant, in whom the property as to half the bill remained.

Our judgment must therefore be for the defendant.

Judgment for the defendant.[1]

ROUQUETTE *v.* OVERMANN AND SCHOU.

IN THE QUEEN'S BENCH, JULY 5, 1875.

[*Reported in Law Reports*, 10 *Queen's Bench*, 525.]

CASE stated without pleadings.

The action is brought by the plaintiff as indorsee against the defendants, the drawers and indorsers of a bill of exchange, dated the 28th of June, 1870.[2]

April 30, May 4. *Benjamin, Q.C.* (with him *Trevelyan*), for the plaintiff.

Herschell, Q.C. (with him *Ravenhill*), for the defendants.

The arguments are fully given in the judgment of the court.

In addition to the authorities noticed in the judgment, the following were cited: For the plaintiff: Patience *v.* Townley,[3] Rowe *v.* Young; Code de Commerce, arts. 161, 162; Codes Annotés, par Sirey, n. 30 and n. 31 to art. 162 of the Code de Commerce; and n. 3 and n. 4 to the same article, in the supplement of the same work; Story's Conflict of Laws, § 347; Allatini *v.* Abbott.[4] For the defendants: Code de Commerce, art. 163; Nouguier, Lettres de Change, par. 999; Gilbert *v.* Brett, Le case de mixt moneys;[5] arts. 85 and 86 of German Code, 2 Leoni Levi, Commercial Law, p. 73. *Cur. adv. vult.*

July 5. The judgment of the court (Cockburn, C. J., and Lush and Quain, JJ.) was delivered by

[1] Delauney *v.* Mitchell, 1 Stark. 439; Manley *v.* Boycott, 2 E. & B. 46, 56 (*semble*); Bank of U. S. *v.* Dunn, 6 Pet. 51 (*semble*); Smith *v.* Childress, 27 Ark. 328 (*semble*); Lawrence *v.* Strington Bank, 6 Conn. 521; Dale *v.* Gear, 38 Conn. 15 (*semble*); Carhart *v.* Wynn, 22 Ga. 24; Best *v.* Nokomis Bank, 76 Ill. 608 (*semble*); Barker *v.* Prentiss, 6 Mass. 430 (*semble*); Johnson *v.* Martinus, 4 Halst. 144; Chaddock *v.* Vanness, 35 N. J. 517 (*semble*); Herrick *v.* Carman, 10 Johns. 224; Woodward *v.* Foster, 18 Grat. 200 (*semble*), *accord.* — ED.

[2] The statement of the facts of the case has been omitted, being substantially reproduced in the judgment of the court. — ED.

[3] 2 Smith, 223; 1 Chitty on Bills of Exchange, 714.

[4] 26 L. T. (N. S.) 746.

[5] Davys, 18; 2 Bli. at p. 98, n.

COCKBURN, C. J. This case was heard before my brothers Lush and Quain, and myself. It was an action brought by the plaintiff, as indorsee and holder, against the defendants as drawers and indorsers, of a bill of exchange.

The defendants are merchants at Manchester. They had business transactions with the house of Magalhaes Frères, of Paris, and, having shipped goods on account of the latter to Pernambuco, drew on them the bill of exchange in question, which was as follows:—

"MANCHESTER, 28th June, 1870.

"For £345 15*s.* 2*d.* sterling. On the 5th of October, 1870, pay this first of exchange (second and third unpaid) to the order of ourselves the sum of £345 15*s.* 2*d.* sterling, at the exchange as per indorsement, for value received, which place to account as advised.

"OVERMANN & SCHOU.

"To Messrs. MAGALHAES FRÈRES, 5 Rue Martel, Paris."

The defendants were in the habit of sending bills so drawn on Paris to the plaintiff, who carried on business in London, for the purpose of his disposing of them, and remitting to them the proceeds; and there being no fixed rate of exchange between Manchester and Paris, the bills were drawn in English money, at an exchange of so many francs per pound, to be fixed by the plaintiff's indorsement on the bill.

The bill in question being, as we have seen, to the order of the drawers, was by them indorsed specially to the plaintiff, and transmitted to him for sale. The plaintiff having indorsed the bill, and by his indorsement on it fixed the rate of exchange at 25 francs 38¾ cents. for the pound sterling, sold the bill to Messrs. Krauetler & Mieville, of London, and duly remitted the proceeds to the defendants, minus the commission received by him on such transactions by agreement between him and them. Krauetler & Mieville indorsed the bill to Pillet, Will, & Co., of Paris, and transmitted it to them. The bill was duly accepted in Paris by Magalhaes Frères, the drawees.

The bill, according to its tenor, was payable on the 5th of October, 1870. Pending its currency, the German army having invaded France, the Emperor Napoleon, on the 13th of August, by virtue of his legislative power, issued an edict in these terms: "The time within which protest and all other acts required to preserve the right of action on negotiable instruments signed before the promulgation of the present law must be effected, is prolonged for a month. Payment cannot be demanded of the indorsers or other persons bound thereby within that time."

The Emperor Napoleon having ceased to reign, on the 10th of September, the Government of the National Defence, the then sovereign

power of France, passed and promulgated a law prolonging the delay thus afforded by the law of the 13th of August for the further period of a month from the ensuing 14th of September.

Similar enactments were passed from month to month by the legislative power, and duly promulgated by the head of the executive government, by which the operation of the law of the 13th of August was extended to the 13th of March, 1871. On the 19th of February, the war between France and Germany came to an end. On the 10th of March, the National Assembly passed, and the head of the executive government duly promulgated, a law by the 2d article of which it was, among other things, enacted that bills, &c., which had become due between the 13th of August and the 12th of November, 1870, should be payable at the expiration of seven months from the time at which they respectively fell due according to their tenor. By the 3d article, instead of the one day allowed by the 162d article of the Code de Commerce for effecting protest on non-payment, ten days were to be allowed for that purpose. By the effect of this law, the bill in question, having fallen due on the 5th of October, would have been payable on the 5th of May. But fresh occurrences took place, which led to a still further postponement.

At the end of March, a revolution broke out at Paris, which led to the suspension of commercial business. On the 26th of April, a law was passed by the National Assembly, the then sovereign power of France, and was duly promulgated by the president of the council, by which it was enacted that commercial bills, whatever might be the date of their signature, payable in the department of the Seine, which had already fallen due, or which would fall due between the 18th of the previous month of March and a period of ten days after the re-establishment of the postal service between Paris and other parts of France, should not be liable to payment till after that term. The resumption of such service was to be notified by the government in the *Journal Officiel*, and the ten days were to run from the publication of such notice. The benefits of the delay in making the necessary protest in case of non-payment, granted by the 3d article of the law of the 10th of March, was made applicable to all commercial bills falling within the law.

On the 1st of July, the government declared the postal service between Paris and the rest of France re-established, and the present bill would consequently have been payable on the 11th; but on the 4th of July, a further law, promulgated on the 7th, was passed, whereby the delay granted by the law of the 10th of March for protesting bills of exchange which had fallen due between the 13th of August and the 12th of November was extended for another four months, making

thus eleven months in the whole; and payment therefore could only be demanded, date for date, between the 13th of July and the 12th of October ensuing. By a further article, the holders of bills of exchange, &c., which, in the regular course, would have fallen due prior to the passing of the law, were to notify within twenty days to the parties liable thereon the obligations they would have to fulfil in respect thereof. The debtor was to be entitled to avail himself of the delays in respect of protests granted by the present law. The notice to the party liable and the answer of the latter were to be noted on the bill.

On the 19th of July, Pillet, Will, & Co., the holders of the bill, gave the notice required by this law to Magalhaes Frères, the acceptors, who thereupon wrote on it: "Vu pour prorogation. — Paris, 19 Juillet, 1871. Magalhaes Frères." On the 5th of September, the day on which the extended term of grace expired in respect of this bill, Pillet, Will, & Co. presented the bill for payment, which was refused. They then presented it on the same day to Mr. Wm. Bechtel, of Paris, to whom reference in case of need had been made by the drawers on the second of exchange, but he also refused payment. The bill was duly protested, according to the French law, on the ensuing day, the 6th of September. Notice of dishonor and of the protest of the bill in manner required by the law of France was sent by Pillet, Will, & Co. to Krauetler & Mieville on the 8th of September, and was received by the latter on the 9th. The like notice was on the same day given by Krauetler & Mieville to the plaintiff, and by him to the defendants. The defendants refused payment of the bill.

Having paid to Krauetler & Mieville the sum of £368 18*s.* 8*d.*, the amount due on the bill for principal and interest, the plaintiff brings this action to recover that amount, together with a further sum for interest and postages.

The main ground of defence is that due diligence was not used by the holders of the bill in presenting it for payment at the appointed time, or in giving notice of dishonor on its non-payment at that time; by reason of which the indorsers were discharged; whence, as was contended, it followed that the plaintiff had paid the bill in his own wrong, and therefore could not claim to be indemnified by the defendants; who, again, it was said, were entitled on their own account to notice of dishonor on non-payment at the regular time, — it being contended that, whatever might be the effect of this special legislation of the French government, as between the holders of the bill and the acceptors, the holders, though resident in France, were bound, the bill having been drawn and indorsed in England, if they desired to fix the parties in this country, to present the bill for payment at the time at which it fell due in the regular course, according to its tenor, and, if it was not

then paid, to give notice of its dishonor, — the right to insist on due diligence in these particulars according to the law of England, as a condition precedent of liability, being one which it was not competent to a foreign legislature to affect. That, at all events, the transaction between the defendants and the plaintiff having occurred in this country, their respective rights and liabilities must be determined by English law. The implied contract of indemnity, which attaches on non-payment of a bill of exchange, is based, it was urged, on the assumption that the bill will be presented for payment at the time specified by it; and that, in case of non-payment, notice of dishonor will thereupon be given. How then, it was asked, can the right to insist on these as the conditions of liability on a bill drawn and indorsed in this country be modified or affected by the legislation of a foreign country?

The question is of considerable importance and interest in a juridical point of view. It has occupied the attention of the tribunals in Germany, Switzerland, and Italy. The High Court of Leipzig has decided it in favor of the view presented to us on the part of the defendants. The High Court of Geneva and the Cour de Cassation of Turin have come to the opposite conclusion.[1] Our view coincides with theirs.

In considering the subject, two questions present themselves. The first, as to what was the effect of this special legislation on the obligations of the acceptors; the second, as to what, if any, was its effect on the rights and liabilities of the drawers and indorsees *inter se*. It is with the second question that we are more immediately concerned; but the consideration of the first may materially assist us towards the satisfactory solution of the second.

Now that, so far as the French law was concerned, the effect of the exceptional legislation in question was to substitute, as the time of payment, the expiration of the period of grace afforded by it for the time specified in the bill, and to suspend till then the legal obligation of the acceptors to pay, cannot be doubted. If the bill had been presented for payment on the 5th of October, and, payment having been refused, an action had been brought in a French court against the acceptors, whether by a French or foreign holder, the plaintiff must by the effect of the new law have been defeated. Even if the acceptors had been found in this country, and an action had been brought against them in an English court, the result must have been the same. It is well settled that the incidents of presentment and payment must be regulated and determined by the law of the place of performance, — a rule which is strikingly illustrated by the familiar but pertinent

[1] Counsel on the argument read reports of these decisions from newspapers.

example of the effect of days of grace being allowed by the law of the country where a bill of exchange is drawn, but not by the law of the country where it is payable, or *vice versa*, the payment of the bill being, as is well known, deferred till the expiration of the days of grace in the one case, but not so in the other. And this arises out of the nature of the thing, as the acceptor cannot be made liable under any law but his own. It is, indeed, true that, in the present instance, the period of grace has been accorded by *ex post facto* legislation. But this appears to us to make no difference in the result, at all events so far as the obligations of the acceptors are concerned. The power of a legislature to interfere with and modify vested and existing rights cannot be questioned, although no doubt such interference, except under most exceptional circumstances, would be contrary to the principles of sound and just legislation.

Such being the effect of this legislation on the liability of the acceptor, we have next to consider its effects on the relative position of the drawer and the drawee or indorsee and holder. It is said that, although the obligations of the acceptor may be determined by the *lex loci* of the country in which the bill is payable, the contract as between the drawer and indorsee must be construed according to the law of the country where the bill was drawn; and, consequently, that in order to make the defendants, the drawers of this bill, liable, the bill should have been presented at the time specified in it, and on non-payment notice of dishonor should thereupon have been given according to the requirements of English law. It is unnecessary to consider how far this position may hold good as to matter of form, or stamp objections, or illegality of consideration, or the like. We cannot concur in it as applicable to the substance of the contract, so far as presentment for payment is concerned; still less to a formality required on non-payment, in order to enable the holder to have recourse to an antecedent party to the bill. Applied to these incidents of the contract, this reasoning appears to us altogether to overlook the true nature of the contract which a party transferring for value the property in a bill of exchange makes with the transferee. All that he does is to warrant that the bill shall be accepted by the drawee, and, having been accepted, shall, on being presented at the time it becomes due, be paid. In other words, he engages as surety for the due performance by the acceptor of the obligations which the latter takes on himself by the acceptance. His liability, therefore, is to be measured by that of the acceptor, whose surety he is; and as the obligations of the acceptor are to be determined by the *lex loci* of performance, so also must be those of the surety. To hold otherwise would obviously lead to very startling anomalies. The holder might sue the drawer or indorser

before, according to the law applicable to the acceptor, the bill became due; or the acceptor having refused payment till the expiration of the period of grace thus afforded him by the new law, but on presentment at the end of that time having duly paid, the holder might claim compensation against the indorser in respect of any loss he might have sustained by reason of the delay, although the obligations of the acceptor had been fully satisfied by the payment of the bill. Again, as a bill may be indorsed in different countries before it arrives at maturity, and each indorsement becomes a fresh undertaking with the subsequent parties to the bill for due performance by the acceptor, unless the performance to which the acceptor is bound is made the measure and the limit of each indorser's liability, confusion must arise in determining by what law the rights and liabilities of the different indorsers and indorsees *inter se* shall be governed.

It may be urged, no doubt, that, though it may be true that the parties to a bill of exchange, payable in a foreign country, may be assumed to have contracted for the payment of the bill according to the existing law of the country in which it is to be paid, they cannot be assumed to have contracted on the supposition of that law being altered in the interval prior to the bill becoming due; that, on the contrary, the intention of the parties was that the bill should be paid according to the existing law, and the undertaking of the party transferring it was that it should be so paid; and that, such being the effect of the indorsement, the obligation of the indorser cannot, as between him and his indorsee, be affected by *ex post facto* legislation in the foreign country. A strong argument *ab inconvenienti* may also be founded on the serious consequences which may ensue to the holder of a bill of exchange, if the time of payment, as fixed by the bill, may be postponed by subsequent legislation. He may require the money secured by the bill at the precise moment it is to become due; he may have purchased the bill for the purpose of insuring the command of it. The delay in receiving it may involve him in the greatest embarrassment. The indorser ought, therefore, to be held strictly to his undertaking that the bill shall be met at the time stated in it, and contemplated by the parties as the date of payment; that to hold otherwise would be materially to shake the credit and impair the utility of negotiable instruments.

To the first of these arguments, it may be answered that the indorser of a bill guarantees its payment only according to the effect of the bill at the place of payment. He transfers all the right the acceptance gives him against the acceptor, and guarantees that the obligations of the latter, as arising from the acceptance, shall be fulfilled. If, by an alteration of the local law pending the currency of the bill, the obliga-

tions of the acceptor are rendered more onerous, those of the indorser become so likewise. Thus, if it were enacted that certain days should be treated as holidays, and that a bill falling due on any one of them should be paid at an earlier date, the indorser, on non-payment of the bill at such earlier date, would become liable from such date. On the other hand, if the time of payment were postponed by a period of grace being allowed, or by an enactment that a bill falling due on a day appointed to be kept as a holiday should be payable a day after, — as was done by the Act of 34 & 35 Vict. c. 17, — the period at which the liability of the indorser on non-payment by the acceptor would arise would be *pro tanto* delayed.

To the second argument, it may be answered that it goes rather to the expediency of such exceptional legislation than to its effect. Further, that the instances in which it is resorted to are so extremely rare as to be little likely to have the effect of lessening the faith in negotiable instruments or diminishing their utility.

If, then, the right of the holder, as against the acceptor and the antecedent parties, can be thus modified in respect of the time of payment, there can be no injustice or hardship towards them in holding him exempted from the obligations of presenting the bill earlier than his right of payment accrues, or of giving notice of dishonor in order to preserve his right of recourse to them.

If the time of payment, which is of the essence of the contract, and the consequent necessity for presentment at the original time can thus be postponed, it would seem to follow that, *a fortiori*, a formality, the necessity for which arises only on the non-fulfilment of his obligation by the acceptor, would follow any alteration introduced by the law in respect of the time at which that obligation was to be discharged. But, independently of this consideration, we are of opinion, on general principles, that notice of dishonor cannot be required until payment has been legally demandable of the acceptor, and has been refused. It is true that, if the bill had been presented for payment at the time mentioned in it, the acceptors might possibly have omitted to avail themselves of the indulgence accorded by the special law, and might have paid at once. But so might possibly the acceptor of a bill under ordinary circumstances, if asked to do so as matter of grace or of special arrangement. The holder of a bill of exchange cannot be held bound to present it for payment till it becomes legally payable; that is to say, payable as matter of right and not of option. Neither, therefore, can he be called upon to give notice of non-payment to the indorser before the time when his right to demand payment of the acceptor has accrued, and the liability of the indorser, consequent on such refusal, has arisen. There cannot be two different times at which a bill of exchange

becomes payable. Suppose the holder had presented this bill for payment at the time specified in it, and payment had been refused by reason of the extension of time afforded by the new law, such presentment would certainly not have dispensed with the necessity of presenting the bill anew, when the period of grace expired, and the liability of the acceptors had arisen; and the omission to present it then would have had the effect of discharging the indorser. If presentment at the expiration of the time allowed by the special law was necessary to fix the legal liability of the acceptor and the indorser, it was only on such presentment and non-payment thereupon that the bill could be treated as dishonored, or that notice of its dishonor could be effectually given so as to charge the indorser.

Another ground for holding that presentment and notice of dishonor at the earlier period were not necessary to preserve the right of recourse against the defendants, as drawers and indorsers, is to be found in the reasons assigned for requiring presentment at the appointed time and notice of dishonor immediately on payment being refused. The reason given is that the drawer, whom it is intended to make liable, may have the earliest opportunity of withdrawing his assets from the acceptor, or resorting to such other remedies against him as the law may afford. But in such a case as the present, as the acceptor remains bound to the holder to pay the bill when presented at the time it becomes legally due, the drawer could not withdraw from him the means of satisfying that liability, or take steps against him for non-fulfilment of an obligation not as yet capable of being legally enforced.

It was contended, on behalf of the defendants in the present case, that the question before us was concluded by the authority of the decisions of the judicial committee of the privy council in Allen v. Kemble,[1] and of the Court of Exchequer in Gibbs v. Fremont. In delivering the judgment of the committee of the privy council in the former case, Lord Kingsdown lays it down as law that, as between the holder and drawer, or indorser of a bill of exchange, drawn in one country, but made payable in another, if the bill is not paid, the contract is to be governed in respect of damages and costs by the law of the country in which the bill is drawn and not by that of the country in which it is payable. "The drawer," says Lord Kingsdown, "by his contract, undertakes that the drawee shall accept and shall afterwards pay the bill, according to its tenor, at the place of domicile of the drawee, if it be drawn and accepted generally, at the place appointed for payment, if it be drawn and accepted payable at a different place from the place of the domicile of the drawee. If this contract of the drawer

[1] 6 Moo. P. C. 314, 321, 322.

be broken by the drawee, either by non-acceptance or non-payment, the drawer is liable for payment of the bill, not where the bill was to be paid by the drawee, but where he, the drawer, made his contract, with interest, damages, and costs, as the law of the country where he contracted may allow." Whatever may be the respect to which an opinion of the judicial committee of the privy council may be entitled, the authority which would otherwise attach to the statement of the law contained in the foregoing judgment is materially diminished by the fact that it was unnecessary to the decision of the case then before the court. When the case of Allen *v.* Kemble[1] is more fully looked at, it will be seen that the question there turned, not on any disputed liability on a bill of exchange, but on a disputed right of set-off in a case of debtor and creditor. The facts were simply these: A., residing in Demerara, drew a bill on B., residing in Scotland, payable to C.'s order in London, and C. indorsed it to D., residing in Demerara, who indorsed it to E. resident in London. B. accepted the bill, making it payable at a banker's in London. When the bill arrived at maturity, B. was the holder of an overdue acceptance of E., the last indorsee and holder, who in the mean time had become bankrupt, and he claimed to set off the amount of this acceptance, as he was entitled to do, against his liability on his own acceptance. To avoid this right of set-off, the assignees of the bankrupt, instead of suing the acceptor, brought their action against the drawer and an indorser in Demerara. but they were foiled in an unexpected manner. By the Roman-Dutch law, the law of Demerara, a surety called upon to pay on default of his principal is entitled to the benefit of any cross claim which the principal may have against the creditor. Taking advantage of this, the defendants, not at all contesting, as indeed they could not for a moment contest their liability on the bill, claimed, being sued in Demerara, the benefit of the local law, and insisted on their right to set off the amount of the bankrupt's unpaid acceptance in the hands of their principal, the acceptor of the bill on which they were sued, against their liability on the bill, a right which they would not have had by the law of England. The colonial court disallowed the claim, but its decision was afterwards reversed by the judicial committee of the privy council, in our opinion most properly, so far as the result is concerned. But the decision had, obviously, nothing to do with the law relating to bills of exchange. It was simply, as we have said, a question as to the applicability of the law of Demerara, as to set-off, to a case of principal and surety on a debt of the principal arising in a country where a different law prevailed. Nothing turned on the law as to bills of exchange. The question would have been precisely the same, if the

[1] 6 Moo. P. C. 314.

action against the parties in Demerara had been brought on a guarantee given by them in respect of goods supplied to a party in this country.

The case of Gibbs v. Fremont, in which the Court of Exchequer adopted and acted upon the law laid down by Lord Kingsdown in Allen v. Kemble,[1] is more to the present purpose, as the decision there turned on the law applicable to bills of exchange. A bill having been drawn in California on a party resident at Washington, without interest being reserved on the face of it, in an action against the drawer by a holder in this country, acceptance having been refused, it was held that the holder was entitled to interest according to the rate current at California.

Without expressing any opinion as to the soundness of this view, it is sufficient to observe that the question in the present case turns, not upon what may be the rights and liabilities of indorser and indorsee in regard to damages on non-payment of the bill, but on the time of presentment for payment and notice of dishonor. Now, as has already been observed, it is well settled that the time when a bill becomes due depends on the *lex loci solutionis;* and it is equally certain that presentment for payment before a bill is due in point of law is inoperative to affect an antecedent party. It was so ruled by Lord Kenyon in Wiffen v. Roberts, and the law has never been questioned. It is equally clear that, until presentment for payment has been effectually made, notice of dishonor cannot be effectually given.

The case of Rothschild v. Currie, in this court, establishes the position that where a bill, payable in a foreign country, is drawn and indorsed in this country, the sufficiency of the notice of dishonor must depend on the law of the place of payment; and consequently that notice of dishonor, good by the law of France, in which country the bill in that case was payable, though beyond the time within which such notice must have been given according to English law, was sufficient to fix the indorser. The same point arose in Hirschfeld v. Smith, and was decided by the Court of Common Pleas on the authority of Rothschild v. Currie; though also on the further ground that, assuming that the contract between indorser and indorsee, on a bill indorsed in England, is to be governed by the law of England, and therefore notice of dishonor, as required by the law of England, is necessary, yet that reasonable notice is all that is required; and though, as regards inland bills, what is reasonable time has become fixed by practice and legal decision, as regards bills payable in a foreign country, what is a reasonable time must depend on circumstances, and that the law of the country where the bill is payable affords a safe criterion, and notice

[1] 6 Moo. P. C. 314.

given according to it may be taken to be reasonable notice. It cannot be disputed that notice of dishonor, as given in this case, would have been good and sufficient according to the law of France. It follows, upon the authorities referred to, that it must be held to have been sufficient as between the holder and the antecedent parties to the bill in an action brought in this country.

Moreover, if it be once established that, on the dishonor of a bill of exchange payable in a foreign country, the notice to be given to the drawer or indorser should be, with reference to time and to the required formalities, in conformity with the law of the place of payment, a further ground presents itself for deciding against the defendants in the present case. By the law of France, before notice of dishonor can be given, a protest, accompanied by certain prescribed formalities, made through the intervention of a notary public, is indispensably necessary. See art. 162 of the Code de Commerce. And, by art. 165 of the same code, it is of this protest that the holder must give notice to the drawer or indorser whom he proposes to make liable. But, by the special law by which the bill now in question was affected, the protesting of all bills coming within its operation was expressly prohibited till the expiration of the additional time for payment allowed by way of indulgence to the acceptors. It is admitted that this bill was protested at the earliest time which the existing law admitted of, and that due diligence was used in giving notice to the defendants from the time of making the protest.

On these grounds, we are of opinion that the presentment for payment was made, and the notice of dishonor given, at the right time, and that the foundation on which the defence rests consequently fails.

Our judgment, therefore, must be for the plaintiff.

Judgment for the plaintiff.[1]

[1] Allatini v. Abbott, 26 L. T. Rep. 746, *accord.* — Ed.

See Barlow v. Gregory, 31 Conn. 261; Duerson v. Alsop, 27 Grat. 220.

T

MERRICK RICE v. JAMES STEARNS AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1807.

[*Reported in* 8 *Massachusetts Reports*, 225.]

ASSUMPSIT by the indorsee of a promissory note against the promisors. The note was originally made payable to Jonathan Symonds, or his order, who indorsed it to the plaintiff in these words: "For value received, I order the contents of this note to be paid to Merrick Rice, at his own risk."

Upon the trial, at the last April term in this county, before Sedgwick, J., two of the defendants denied the signature of their names to the note. The plaintiff thereupon offered Symonds, the promisee named in the note, to prove that he, as a deputy sheriff, having an execution in his possession against the defendant James Stearns, and having arrested the said James thereon, took the said note in satisfaction of said execution, which he afterwards indorsed in manner aforesaid, to the present plaintiff, as attorney to the creditor in said execution, which was discharged. The defendants objected to the competency of Symonds to testify to the said facts, on the ground that he was interested. The judge overruled the objection, and the plaintiff had a verdict. The defendants moved for a new trial because Symonds was admitted, and the cause was continued to this term.

And now, *Bigelow*, for the defendants, contended that the witness had an immediate interest in the issue; for, if the note was forged, he was still liable to the creditor on the execution for the amount of the judgment. Perhaps the plaintiff's release might cure the objection as far as it rests on the above ground. But there is another view, in which the objection has a still more serious aspect, and which the plaintiff's release cannot cure. By supporting this note as genuine, he prevents a criminal prosecution against himself for the forgery,—a consideration of much more importance to him than the mere liability to pay a sum of money.

It is improper, upon general principles, that a promisee should be received as a witness in supporting a note of hand. It will lead to a mischievous practice. Persons who hold doubtful notes will transfer them to confidential friends, and make themselves witnesses. It is superfluous to suggest that such a practice necessarily leads to gross corruption and perjury.

Dana, for the plaintiff, said that the witness having, by his special indorsement on the note, secured himself against liability in any event, it was difficult to discern his interest in this action. As to his being answerable criminally, whatever foundation there was for the suggestion, it could go only to his credibility, not to his competency.

The court took time for advisement, and afterwards their opinion was delivered as follows by

PARSONS, C. J. The interest of Symonds must depend on the effect of his indorsement.

A security, negotiable in its creation, must, during its negotiation, preserve its negotiable quality; otherwise, when assigned, the assignee would hold a contract by the assignment different from the contract assigned. It is for this reason settled that a negotiable note indorsed in blank, or by a direction to pay the contents to A. B., omitting the words, "or his order," is further negotiable by the holder under such indorsement. It is also settled that when a negotiable security is indorsed, "Pay the contents to my use," or "to the use of a third person," or "Carry this bill to the credit of a third person," such an indorsement is not an assignment of the security, but is only an authority to pay the money agreeably to the direction of the indorsement. There are other restricted indorsements also made; as, "Pay the contents to A. B. only." Whether this indorsement is only an authority to A. B. to receive the money for the use of the indorser, or for his own use, if made for value received, or whether in this last case the restriction is not void, and A. B. may further negotiate it, seems not to be settled. If the property of the note be vested in A. B., perhaps he will hold it with its negotiable quality, notwithstanding the restriction. But of this we give no opinion.

The case at bar is a restricted indorsement of another kind, and which in practice is very common. The promisee of a negotiable note indorses it to a third person, or his order, for value received, stipulating that the indorser is not to be responsible, if the maker does not pay it. If, notwithstanding this stipulation, the indorser is answerable, if the maker do not pay the note, then the witness, Symonds, is interested, and ought not to have been sworn.

Upon consideration, we are of opinion that the promisee, indorsing the note under this express stipulation, is not eventually holden to pay the note, if the maker should not. As the promisee had the property of the note, he might dispose of it on what terms he pleased, with the assent of the purchaser, and the latter cannot complain of the necessary effect of his own agreement; and the indorser cannot be charged upon his own contract directly against the express intent of it. If

this opinion is correct, Symonds, after this restricted indorsement, had no interest in the event of the suit, and was a competent witness.

Another point of some importance arises, which involves the question whether, by this restricted indorsement, the property of the note passed to the indorsee, so that he may sue upon it in his own name. If the restriction applied to the quality of the contract, so as to render a negotiable security no longer negotiable, there would be some difficulty in allowing, consistently with legal principles, an indorsement of this effect to operate as a transfer of the note. But this is not the effect of the restriction: the note remains negotiable in the hands of the indorsee, although he has no remedy against the indorser; and, in whose hands soever the note may come, the maker is still liable, according to the terms of his original contract, to pay to the promisee or his order. The note, therefore, being the absolute property of the plaintiff, and Symonds being a competent witness, the verdict must stand, and judgment be entered accordingly.[1]

SLACUM v. POMERY.

IN THE SUPREME COURT, UNITED STATES, FEBRUARY, 1810.

[*Reported in* 6 *Cranch*, 221.]

ERROR to the Circuit Court for the District of Columbia, sitting in Alexandria, in an action of debt (under the law of Virginia), brought by Pomery against Slacum, as indorser of a bill of exchange, dated the 6th of August, 1807, drawn in the Island of Barbadoes, by Charles Cadogan, a merchant residing there, at sixty days' sight, upon Barton, Irlam, & Higginson, at Liverpool in England, for £138 17*s.* 9*d.* sterling, payable to Slacum or order, who indorsed it, at Alexandria in the District of Columbia, to the plaintiff.

The declaration was "of a plea that he render unto him one hundred and thirty-eight pounds, seventeen shillings, and ninepence sterling money of Great Britain, with interest at the rate of five per centum per annum, from the twenty-third day of December, eighteen hundred and seven, until paid, together with fifteen per cent damages on the said one hundred and thirty-eight pounds, seventeen shillings, and nine-

[1] Welch *v.* Lindo, 7 Cranch, 159; Hailey *v.* Falconer, 32 Ala. 536; Wilkerson *v.* Daniels, 1 Greene, 179; Davis *v.* Sawtelle, 30 Me. 389; Waite *v.* Foster, 33 Me. 424; Upham *v.* Prince, 12 Mass. 13 (*semble*); Richardson *v.* Lincoln, 5 Met. 201; Fitchburg Bank *v.* Greenwood, 2 All. 484; Craft *v.* Fleming, 46 Pa. 140; Davenport *v.* Schram, 9 Wis. 119, *accord*.

Conf. Childs *v.* Wyman, 44 Me. 433; Lawrence *v.* Dobyn, 30 Mo. 196. — ED.

pence, and ten shillings and sixpence sterling, of the value of two dollars and thirty-three cents current money of the United States, costs of protest, which to him he owes," &c.

It then stated the making and indorsing of the bill, the non-acceptance and non-payment, and the protest for non-payment, "by reason of which premises, and by force of the statute in that case made and provided, action hath accrued to the plaintiff to demand and have of the defendant the said sum of one hundred and thirty-eight pounds, seventeen shillings, and ninepence sterling, and interest at the rate of five per cent per annum, from the twenty-third of December, eighteen hundred and seven, until paid, together with fifteen per cent damages, and ten shillings and sixpence sterling, of the value," &c.

Upon the trial of the cause on the issue of *nil debet*, the defendant below took a bill of exceptions, stating that evidence was offered of the bill, the indorsement by the defendant to the plaintiff in Alexandria (both parties being inhabitants of that town), the protest for non-payment, and that, by the laws of Barbadoes, the damages, upon protested bills of exchange, were only ten per cent upon the principal and interest due upon the bill. Whereupon, the defendant prayed the court to instruct the jury that the plaintiff was not entitled to recover more than the damages allowed upon protested bills according to the law of Barbadoes, and that he was not entitled in this case to fifteen per cent damages, which instruction the court refused to give.

The verdict and judgment being for the plaintiff, for the whole amount demanded in the declaration, the defendant brought his writ of error.

The act of assembly of Virginia (p. 113) provides: "That where any bill of exchange is or shall be drawn for the payment of any sum of money in which the value is or shall be expressed to be received, and such bill is or shall be protested for non-acceptance or non-payment, the drawer or indorser shall be subject to fifteen per centum damages thereon, and the bill shall carry an interest of five per centum per annum, from the date of protest until the money therein drawn for shall be fully satisfied and paid." "And that it shall be lawful for any person or persons, having a right to demand any sum of money upon a protested bill of exchange, to commence and prosecute an action of debt for principal, damages, interest, and charges of protest, against the drawers or indorsers jointly, or against either of them separately; and judgment shall and may be given for such principal, damages, and charges, and interest upon such principal, after the rate aforesaid, to the time of such judgment, and for interest upon the said principal money recovered, after the rate of five per centum per annum, until the same shall be fully satisfied."

Swann, for the plaintiff in error, contended

That the damages must be according to the law of the place where the bill was drawn.

Youngs, contra. The law of the place where the contract was made must prevail. The contract of the defendant as indorser was made in Alexandria. Every indorsement creates a new contract, and is in the nature of a new bill.

MARSHALL, C. J., delivered the opinion of the court as follows, viz.: —

Upon a critical examination of the act of assembly on which this action is founded, the court is of opinion that it is rightly brought. Although the drawer of the bill was not liable to the damages of Virginia, the indorser is subject to them, he having indorsed the bill in Alexandria. The words of the act are that, where a bill of exchange shall be protested, "the drawer or indorser shall be subject to fifteen per cent damages thereon." The third section gives an action of debt "against the drawers or indorsers jointly, or against either of them separately." The act of assembly appears to contemplate a distinct liability in the indorser, founded on the contract created by his own indorsement, which is not affected by the extent of the liability of the drawer. This is the more reasonable, as a bill of exchange is taken as much on the credit of the indorser as of the drawer; and the indorsement is understood to be not simply the transfer of the paper, but a new and a substantive contract.[1]

[1] The judgment was reversed for want of an averment in the declaration of notice of protest for non-payment. So much of the case as relates to that point has been omitted.

The principal case has been generally followed.

United States Bank v. United States, 2 How. 711; Dundas v. Bowler, 8 McL. 397 (*semble*); Kuenzi v. Elvers, 14 La. An. 391; Price v. Page, 24 Mo. 65; Bouldin v. Page, 24 Mo. 594; Page v. Page, 24 Mo. 595; Hendricks v. Franklin, 4 Johns. 119; Graves v. Dash, 12 Johns. 17; Denston v. Henderson, 13 Johns. 322; Cowperthwaite v. Sheffield, 1 Sandf. 416; Schermerhorn v. Pelham, Conf. R. 452; 2 Hayw. (N. Ca.) 280, s. c.; Hazlehurst v. Kean, 4 Yeates, 19; Winthrop v. Pipoon, 1 Bay, 468.

The fixed percentage of damages allowed by statute (or by usage: Wood v. Watson, 53 Me. 300) in many of the States in this country has been generally given in lieu of re-exchange. But see Graves v. Dash, *supra*, and Denston v. Henderson, *supra*, where statutory damages were allowed in addition to re-exchange. — ED.

CRAM v. HENDRICKS.

IN THE COURT OF ERRORS, NEW YORK, DECEMBER, 1831.

[*Reported in* 7 *Wendell*, 569.]

ERROR from the Supreme Court. Hendricks, as indorsee, sued Cram, as the indorser of two promissory notes, made by one Gomez. The notes amounted, together, to upwards of $3,000; were given in September, 1825, payable four months after date. The consideration of the notes was rum sold by Cram to Gomez. About three months before the notes came to maturity, Cram, the payee, employed a broker to raise the money for him upon the notes, and delivered them to him, indorsed in blank. The broker applied to Hendricks, the father-in-law of the maker, to discount the notes, who cashed them, charging a discount of one per cent per month for the time they had to run; the discount on the two notes amounting to $90.22. Hendricks was informed at the time that the notes belonged to Cram, and that they were to be discounted for his benefit. The notes, when due, not being paid by Gomez, were protested, and notice of non-payment given to Cram, who was sued as the indorser of the notes. The jury who tried the cause were instructed by the circuit judge that the plaintiff was entitled to a verdict for the amount actually advanced by him, with lawful interest thereon from the time of the advance. The jury found accordingly. The defendant excepted to the direction given by the judge, and applied to the Supreme Court for a new trial: the application was denied, and judgment was rendered for the plaintiff. Whereupon, the defendant sued out a writ of error.

The following is the opinion which was delivered in the Supreme court:—

BY THE COURT, SUTHERLAND, J. It is admitted that the notes in question were given by Gomez to Cram for a quantity of rum sold by Cram to him, and that in the hands of Cram, the payee (before they were discounted by the plaintiff), they were perfect and available notes, upon which he might have maintained an action against Gomez, the maker. The question, then, is, whether the discounting of these notes by the plaintiff, thus available in the hands of the payee, at a higher premium than the legal rate of interest, was an usurious transaction, which avoided the notes, or whether it was the mere purchase of valid pre-existing securities. The cases of Braman v. Hess [1] and Munn v. The Commission Company [2] are entirely decisive upon this question.

[1] 13 Johns. R. 52. [2] 15 Johns. R. 44.

In the first case, the action was brought upon a note drawn by one Williams, in favor of Hess, the defendant, and by him indorsed to Braman, the plaintiff. The defendant offered to show upon the trial, in mitigation of damages, that the transfer of the note by the indorser to the indorsee was made on a discount of $90. This evidence was rejected at Nisi Prius. But, upon a motion for a new trial, it was held that it was competent in an action by the payee against the drawer, and by the indorsee against his immediate indorser, to show what was the real consideration passing between them, and that the plaintiff could recover no more than he had actually paid for the note. The court say that, if this suit was by the indorsee against the maker of the note, it would not be in his mouth to say the plaintiff purchased it at a discount. But, the defendant being the immediate indorser of the plaintiff, the proof offered that the note was purchased for $90 under the face of it should have been admitted. It was not even suggested in that case that the transaction was liable to the imputation of usury; and the observation of the court, that if the suit had been against the maker, he could not have availed himself of the fact that the note had been purchased at a discount, shows conclusively that, in their opinion, there could be no usury in the purchase of a pre-existing valid security.

But, in the subsequent case of Munn v. The Commission Company,[1] this precise question arose, was very fully discussed by able counsel, and was deliberately considered and decided by the court. That was an action of assumpsit, brought by the plaintiff, as indorsee, against the defendants, as acceptors of a bill of exchange: it was indorsed to the plaintiff by Oliver Ruggles, the payee of the bill, at a discount greater than the legal rate of interest, and it was contended that this was an usurious transaction, and avoided the bill. The only doubt which the court entertained upon this point was whether the bill was available in the hands of Oliver Ruggles, the payee, and whether he could have maintained a suit upon it. Judge Spencer, in delivering the opinion of the court, says, upon a more careful examination of the case, we see no reason to doubt that the bill, whilst in the hands of Oliver Ruggles, and before it was discounted by the plaintiff at a higher rate than the legal interest, was a perfect and available bill, and that when it became due he could have maintained an action upon it, either against the defendant or Herman Ruggles, the drawer. This, he continues, appears to the court to be the true test in distinguishing between a case where the discount of a bill at a higher premium than the legal rate of interest will render the transaction legal by considering it the purchase of a bill already perfect and available

[1] 15 Johns. R 44.

to the party holding it, and where it will be illegal as an usurious loan of money.

The principle is too well settled to be questioned, that a bill free from usury in its concoction may be sold at a discount; because, as it was free from usury between the original parties to it, no subsequent transaction with another person can, as it respects those parties, invalidate it. Had it appeared that Oliver Ruggles had no interest in the bill, but had merely lent his name for the accommodation of Herman Ruggles, the plaintiff's purchase of the bill would have been usurious, and he could not have recovered upon it, because until such purchase the bill would have been mere waste paper, and it would have had no existence, or been available, until the plaintiff acquired the title, and that title, being contaminated and infecting the bill, would be invalid as against all the parties to it. This doctrine is fully sustained by the English authorities, Wiffen *v.* Roberts, Daniel *v.* Cartony,[1] Parr *v.* Eliason, Lowe *v.* Waller, Ferral *v.* Shaen,[2] where the principle is considered and the cases are collected. See also Ord on Usury, 103 *a;* 8 T. R. 391; 3 Esp. R. 22; Jones *v.* Davison.[3]

The doctrine contended for by the counsel for the defendant, that, wherever the party assigning the note remains liable, it is not a sale of the security, but a loan, is fully disposed of by the cases in this court to which I have adverted. In Braman *v.* Hess,[4] the suit was by the indorsee against the indorser, who transferred the note. In Munn *v.* The Commission Company,[5] Oliver Ruggles indorsed the bill when he sold or transferred it to the plaintiff, and stood in the same relation to him as Hess did to Braman in the previous case, and was, unquestionably, equally responsible as indorser.

The case of Lowes *v.* Mazzaredo is the only one to be found in which a different doctrine has been held. It was in that case decided that, if the payee of a bill of exchange indorses it upon an usurious contract, a *bona fide* holder cannot afterwards recover upon it against the acceptor. My researches have not enabled me to discover that that case has ever been recognized or followed in England. But, whatever may be its authority in Westminster Hall, it cannot authorize a departure in this court from what has been declared in repeated adjudications to be the established law on this subject.

Motion for new trial denied.[6]

[1] 1 Esp. R. 274. [2] 1 Saund. 295, n. 1. [3] 1 Holt. N. P. 256.
[4] 18 Johns. R. [5] 15 Johns. R.

[6] After two arguments in the Court of Errors, the judgment for the plaintiff was affirmed by the following vote:—

For affirmance. — The President of the Senate, and Senators Allen, Armstrong,

MERRITT AND MYERS v. BENTON.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, JANUARY, 1833.

[*Reported in* 10 *Wendell*, 116.]

THIS was an action of assumpsit, tried at the Montgomery circuit, in May, 1831, before the Hon. Esek Cowen, one of the circuit judges.

The defendant was the indorser of a promissory note for $276,

Beardsley, Bronson, Conkling, Deitz, Dodge, Foster, Gere, Lynde, Mather, Maynard, M'Lean, Talmadge, and Todd, — 16.

For reversal. — The Chancellor, and Senators Hubbard, Roxford, Sanford, Sherman, Throop, Warren, and Westcott, — 8.

The opinions delivered in the Court of Errors (7 Wend. 573–664) have been omitted on account of their great length.

The doctrine of the principal case, that the transfer of a completed bill or note is none the less a sale, even though the instrument be indorsed by the transferrer, and is accordingly not within the statute prohibiting usurious loans, has been generally adopted in this country. Saltmarsh *v.* Planters' Bank, 14 Ala. 668 (*semble*); Sherman *v.* Blackman, 24 Ill. 345; State Bank *v.* Coquillard, 6 Ind. 282; Lloyd *v.* Keach, 2 Conn. 175; Tuttle *v.* Clark, 4 Conn. 153; Belden *v.* Lamb, 17 Conn. 441; Burt *v.* Gwinn, 4 Har. & J. 507 (*semble*); Ayer *v.* Tilden, 15 Gray, 178; Newman *v.* Williams, 29 Miss. 212; Durant *v.* Banta, 8 Dutch. 624 (overruling Freeman *v.* Brittin, 2 Harr. 191); Munn *v.* Commission Co., 15 Johns. 44; Rice *v.* Mather, 8 Wend. 62; Cameron *v.* Chappell, 24 Wend. 94; Wycoff *v.* Longhead, 2 Dall. 92, in which cases, in actions by an indorsee against a maker or acceptor, the courts declined to follow Lowes *v.* Mazzaredo, *supra*, p. 478. In Cowles *v.* McVicker, 3 Wis. 725, and Armstrong *v.* Gibson, 31 Wis. 61, a transaction like that in the principal case was held to give the indorsee a complete title as against the maker, but no title as against the indorser. In Ruffin *v.* Armstrong, 2 Hawks, 411; McElwee *v.* Collins, 4 Dev. & B. 209, and Bynum *v.* Rogers, 4 Jones (N. Ca.), 399 (*semble*), such a transaction was held usurious and void for all purposes.

The other position of the court in the principal case, namely, that an indorsee who purchases a bill or note at a discount beyond the legal rate of interest, can recover of his indorser only the amount actually paid with legal interest, although it has been adopted in other jurisdictions, — Noble *v.* Walker, 32 Ala. 456; Coye *v.* Palmer, 16 Cal. 158; Youse *v.* McCrary, 2 Blackf. 243; French *v.* Grindle, 15 Me. 168; Farmer *v.* Sewall, 16 Me. 456 (*semble*); Lane *v.* Steward, 20 Me. 98; Braman *v.* Hess, 13 Johns. 52; Mazuzan *v.* Mead, 21 Wend. 285; Ingalls *v.* Lee, 9 Barb. 647; Cobb *v.* Titus, 13 Barb. 45; Brock *v.* Thompson, 1 Bail. 322; May *v.* Campbell, 7 Humph. 450 (*semble*), — seems to be thoroughly untenable, and to have been taken in consequence of a misconception of the case of Wiffen *v.* Roberts, *supra*, p. 117.

For decisions maintaining the opposite view, that the indorser is liable in such cases, as both parties intended, for the face value of the instrument, see Roark *v.* Turner, 29 Ga. 455; Nat. Bank *v.* Green, 33 Iowa, 140; Durant *v.* Banta, 8 Dutch. 624. In the last case, the court said (p. 636): "As to the doctrine held in New York, that the indorsee of a promissory note, who buys it at less than its face, can only recover

dated 15th November, 1828, payable five months after date, given for the balance of a previous note of $332, held by the plaintiffs against one G. Petrie, the maker of the note in question.[1] The plaintiffs claimed, as part of the amount to which they were entitled, the notary's fees for protesting the note: the defendant objected to their right to recover the same, but the judge instructed the jury to allow the fees of protest. The jury found for the plaintiffs the amount claimed by them to be due on the note and the fees of protest. The defendant moves for a new trial.

J. A. Spencer, for the defendant.

M. T. Reynolds, for the plaintiffs.

By the Court, Savage, C. J. The remaining question is whether the fees of protest were properly chargeable to the defendant. As to this, we have not been referred to any decided case, and we understand that the practice at the circuit is not uniform, though the fees of protest are generally allowed. It is an expense to which the holder of a note is subjected by reason of the default of the indorser, whose duty it is to pay the note at maturity, and it is right therefore that the holder should recover it. It may fairly be considered as a charge incident upon the indorser's failure to perform his contract, and should be allowed to the plaintiffs in the assessment of damages.

New trial denied.[2]

B. & I. Q. AYMAR *v.* SHELDON and Others.

In the Supreme Court of Judicature, New York, October, 1834.

[*Reported in* 12 *Wendell*, 439.]

Error from the Superior Court of the city of New York. Sheldon and others, as indorsees, brought a suit against B. & I. Q. Aymar, as indorsers of a bill of exchange, bearing date 4th June, 1830, drawn by

from the indorser the amount he paid him, with interest, in case the maker does not pay it, it seems to be without foundation in law." See also Nichols *v.* Fearson, 7 Pet. 103; Belden *v.* Lamb, 17 Conn. 441; Turner *v.* Brown, 11 Miss. 425. — Ed.

[1] A portion of the case relating to a question of usury has been omitted. — Ed.

[2] Johnson *v.* Bank of Fulton, 29 Ga. 259, *contra*.

See German *v.* Ritchie, 9 Kas. 106.

Whenever a protest is essential to charge a drawer or indorser, the notarial expense may be recovered of the acceptor, Anon., 1 Atk 140; *Ex parte* Moore, 2 Bro. C. C. 597 (*semble*); Kendrick *v.* Lomax, 2 Cr. & J. 405 (*semble*); or of the drawer or indorser, Morgan *v.* Reintzel, 7 Cranch, 278; Bank of U. S. *v.* U. S., 2 How. 711, 737. Other expenses reasonably incurred by the holder in fixing the liability of an indorser may be recovered in a similar manner. Pearson *v.* Crallan, 2 Smith, 404. — Ed.

V. Cassaigne & Co., at St. Pierre, Martinique, on L'Hotelier Frères, at Bordeaux in France, for 4,000 francs, payable at twenty-four days' sight, to the order of B. Aymar & Co., the name of the firm of B. & I. Q. Aymar. The plaintiffs set forth the indorsement of the bill of exchange at the city of New York, where, they averred, that they and the defendants, all being citizens of the United States at the time of the indorsement, respectively dwelt and had their homes; and then aver that on the 11th August, 1830, the bill of exchange was presented to L'Hotelier Frères, at Bordeaux, for acceptance, according to the custom of merchants, and that they refused to accept: whereupon, the bill was duly protested for non-acceptance, and notice given to the defendants. The defendant pleaded: 1. Non-assumpsit; 2. That the bill declared on was made and drawn in the Island of Martinique, a country then, since, and now, under the dominion and government of the king of France, by persons there dwelling, subjects of the king of France; and that the bill, according to its tenor, was payable at Paris in the kingdom of France, by persons then and still residing and dwelling at Bordeaux in the kingdom of France, subjects of the king of France, to wit, on, &c., at, &c.; that the Island of Martinique, as well as Paris and Bordeaux, and the persons therein respectively residing, and the drawers and drawees, were subject and governed by the laws of the kingdom of France, there and then and still existing and in force, to wit, on, &c., at, &c.; that by the laws of France, then and still at the several places in the plea mentioned existing and in force, it is established, enacted, and provided, in relation to bills of exchange drawn and payable in the countries subject to the laws of France, among other things, in manner and form following, namely; the drawer and indorsers of a bill of exchange are severally liable for its acceptance and payment at the time it falls due. Code de Commerce, 119. The refusal of acceptance is evidenced by an act denominated protest for non-acceptance. Id. 120. On notice of the protest for non-acceptance, the indorsers and drawer are respectively bound to give security to secure the payment of the bill at the time it falls due, or to effect reimbursement of it, with the expense of protest and re-exchange. The time when a bill of exchange becomes due, if payable at one or more days after sight, is fixed by the date of the acceptance, or by the date of the protest for non-acceptance. The holder is not excused the protest for non-payment by the protest for non-acceptance. After the expiration of the above periods (certain periods specified in the Code, and which, in the case of a bill drawn in the West Indies on France, is one year), for the presentment of bills at sight, or one or more days after sight, for protest of non-payment, the holder of the bill loses all his claim against the indorsers, &c., setting

forth, besides the above, a variety of other provisions of the French Code relative to bills of exchange, and then averring that, although at the time of the commencement of the action of the plaintiffs, twenty-four days after sight of the bill of exchange declared on had elapsed, from the day when the same was alleged to have been protested for non-acceptance, yet no protest of the said bill for non-payment had been made, concluding with a verification and prayer of judgment. 8. The defendants pleaded, after referring to the matter of inducement stated in the second plea, that on notice of protest for non-acceptance, as alleged in the declaration, they were ready and willing to give security; and offered to the plaintiffs to give security, according to the true intent and meaning of the laws of France, to secure payment of the bill at the time when the same should fall due, to wit, on, &c., at, &c., concluding as in last plea. To the second plea, the plaintiffs demurred, and took issue upon the third, denying that the defendants did offer security, &c.

The Superior Court, on the argument of the demurrer, adjudged the second plea to be bad; after which, the issues of fact were tried. The jury found for the plaintiffs, on the plea of non-assumpsit, and assessed their damages at $895.52; and found a verdict for the defendants on the third plea. Notwithstanding which last finding, the court gave judgment for the plaintiffs on the whole record. The defendants sued out a writ of error.

D. Lord, Jr., for plaintiffs in error.

D. D. Field and *R. Sedgwick*, for defendants in error.

By the Court, Nelson, J. The only material question arising in this case is, whether the steps necessary on the part of the holders of the bill of exchange in question, to subject the indorsers upon default of the drawees to accept, must be determined by the French law, or the law of this State? If by our law, the plaintiffs below are entitled to retain the judgment; if by the law of France, as set out and admitted in the pleadings, the judgment must be reversed.

We have not been referred to any case, nor have any been found in our researches, in which the point now presented has been examined or adjudged. But there are some familiar principles belonging to the law-merchant, or applicable to bills of exchange and promissory notes, which we think are decisive of it. The persons in whose favor the bill was drawn were bound to present it for acceptance and for payment, according to the law of France, as it was drawn and payable in French territories; and, if the rules of law governing them were applicable to the indorsers and indorsees in this case, the recovery below could not be sustained, because presentment for payment would have been essential even after protest for non-acceptance. No principle,

however, seems more fully settled or better understood in commercial law than that the contract of the indorser is a new and independent contract, and that the extent of his obligations is determined by it. The transfer by indorsement is equivalent in effect to the drawing of a bill, the indorser being, in almost every respect, considered as a new drawer. Chitty on Bills, 142; 3 East, 482; 2 Burr. 674, 675; 1 Str. 441; Selw. N. P. 256. On this ground, the rate of damages in an action against the indorser is governed by the law of the place where the indorsement is made, being regulated by the *lex loci contractus*. 6 Cranch, 21; 2 Kent's Comm. 460; 4 Johns. R. 119. That the nature and extent of the liabilities of the drawer or indorser are to be determined according to the law of the place where the bill is drawn or indorsement made, has been adjudged both here and in England. In Hix *v.* Brown,[1] the bill was drawn by the defendant at New Orleans, in favor of the plaintiff, upon a house in Philadelphia. It was protested for non-acceptance, and due notice given. The defendant obtained a discharge under the insolvent laws of New Orleans, after such notice, by which he was exonerated from all debts previously contracted, and, in that state, of course from the bill in question. He pleaded his discharge here, and the court say: "It seems to be well settled, both in our own and in the English courts, that the discharge is to operate according to the *lex loci* upon the contract where it was made or to be executed. The contract in this case originated in New Orleans; and, had it not been for the circumstance of the bill being drawn upon a person in another State, there could be no doubt but the discharge would reach this contract; and this circumstance can make no difference, as the demand is against the defendant as drawer of the bill, in consequence of the non-acceptance. The whole contract or responsibility of the drawer was entered into and incurred in New Orleans. The case of Potter *v.* Brown[2] contains a similar principle. See also 3 Mass. R. 81; Van Raugh *v.* Van Arsdaln.[3]

The contract of indorsement was made in this case, and the execution of it contemplated by the parties in this State; and it is therefore to be construed according to the laws of New York. The defendants below, by it, here engage that the drawees will accept and pay the bill on due presentment, or, in case of their default and notice, that they will pay it. All the cases which determine that the nature and extent of the obligation of the drawer are to be ascertained and settled according to the law of the place where the bill is drawn are equally applicable to the indorser; for, in respect to the holder, he is a drawer. Adopting this rule and construction, it follows that the law

[1] 12 Johns. R. 142. [2] 5 East, 124.
[3] 3 Caines, 154; 1 Cowen, 107; 6 Cranch, 221; 4 Cowen, 512, *n.*

of New York must settle the liability of the defendants below. The bill in this case is payable twenty-four days after sight, and must be presented for acceptance; and it is well settled by our law that the holder may have immediate recourse against the indorser for the default of the drawee in this respect. 3 Johns. R. 202; Chitty on Bills, 231, and cases there cited.

Upon the principle that the rights and obligations of the parties are to be determined by the law of the place to which they had reference in making the contract, there are some steps which the holder must take according to the law of the place on which the bill is drawn. It must be presented for payment when due, having regard to the number of days of grace there, as the drawee is under obligation to pay only according to such calculation; and it is therefore to be presumed that the parties had reference to it. So the protest must be according to the same law, which is not only convenient, but grows out of the necessity of the case.[1] The notice, however, must be given according to the law of the place where the contract of the drawer or indorser, as the case may be, was made, such being an implied condition. Chitty on Bills, 266, 93, 217; Bayley, 28; Story's Conflict of Laws, 298.

The contract of the drawers in this case, according to the French law, was that, if the holder would present the bill for acceptance within one year from date, it being drawn in the West Indies, and it was not accepted, and was duly protested and notice given of the protest, he would give security to pay it, and pay the same, if default was also made in the payment by the drawee after protest and notice. This is the contract of the drawers, according to this law; and the counsel for the plaintiffs in error insists that it is also the implied contract of the indorser in this State. But this cannot be, unless the indorsement is deemed an adoption of the original contract of the drawers, to be regulated by the law governing the drawers, without regard to the place where the indorsement was made. We have seen that this is not so; that notice must be given according to the law of the place of indorsement; and if, according to it, notice of non-payment is not required, none, of course, is necessary to charge the indorser. But, if the above position of the plaintiffs in error be correct, notice could not then be dispensed with, the law of the drawer controlling. The above position of the counsel would also be irreconcilable with the principle

[1] McClane *v.* Fitch, 4 B. Mon. 599; Chenowith *v.* Chamberlin, 6 B. Mon. 60; Tickner *v.* Roberts, 11 La. 14; Snow *v.* Perkins, 2 Mich. 238 (*semble*); Williams *v.* Putnam, 14 N. H. 543 (*semble*); Bank of Rochester *v.* Gray, 2 Hill, 227 (*semble*); Ross *v.* Bedell, 5 Duer, 462 (*semble*); Carter *v.* Union Bank, 7 Humph. 548; Raymond *v.* Holmes, 11 Tex. 54 (*semble*) *contra*. — Ed.

that the indorsement is equivalent to a new bill drawn upon the same drawee; for then the rights and liabilities of the indorser must be governed by the law of the place of the contract, in like manner as those of the drawer are to be governed by the laws of the place where his contract was made. Both stand upon the same footing in this respect, each to be charged according to the laws of the country in which they were at the time of entering into their respective obligations.

I am aware that this conclusion may operate harshly upon the indorsers in this case, as they may not be enabled to have recourse over on the drawers. But this grows out of the peculiarity of the commercial code which France has seen fit to adopt for herself, materially differing from that known to the law-merchant. We cannot break in upon the settled principles of our commercial law to accommodate them to those of France or any other country. It would involve them in great confusion. The indorser, however, can always protect himself by special indorsement, requiring the holder to take the steps necessary, according to the French law, to charge the drawer. It is the business of the holder, without such an indorsement, only to take such measures as are necessary to charge those to whom he intends to look for payment. *Judgment affirmed.*[1]

[1] Bank of Illinois *v.* Brady, 8 McL. 268; Lowry *v.* Western Bank, 7 Ala. 120; Cox *v.* Adams, 2 Ga. 158; Stanford *v.* Pruet, 27 Ga. 248; Holbrook *v.* Vibbard, 8 Ill. 465; Crouch *v.* Hall, 15 Ill. 268; Mix *v.* State Bank, 13 Ind. 521; Hunt *v.* Staudart, 15 Ind. 88 (overruling Shanklin *v.* Cooper, 8 Blackf. 41); Brown *v.* Bunn, 16 Ind. 406; Rose *v.* Park Bank, 20 Ind. 94; Thorpe *v.* Craig, 10 Iowa, 461; Huse *v.* Hamblin, 29 Iowa, 501 (*semble*); National Bank *v.* Green, 33 Iowa, 140 (*semble*); Young *v.* Harris, 14 B. Mon. 556 (*semble*); Short *v.* Trabue, 4 Met. (Ky.) 299; Carlisle *v.* Chambers, 4 Bush, 268; Duncan *v.* Sparrow, 8 Rob. (La.) 167; Trabue *v.* Short, 18 La. An. 257; Williams *v.* Wade, 1 Met. 82 (*semble*); Allen *v.* Merchants' Bank, 22 Wend. 215; Artisans' Bank *v.* Park Bank, 41 Barb. 599; Hatcher *v.* McMorine, 4 Dev. 122; Trabue *v.* Short, 5 Coldw. 298; Raymond *v.* Holmes, 11 Tex. 54; Nichols *v.* Porter, 2 W. Va. 18, *accord.*

In Musson *v.* Lake, 4 How. 262, it was thought that a presentment, according to the law of the place of indorsement, was sufficient to charge the indorser. But see Wiseman *v.* Chiappella, 23 How. 368; Ellis *v.* Comm. Bank, 8 Miss. 294, *contra.*

See also *supra*, p. 852, n. 1.

A bill drawn in England and payable in Spain was indorsed in England by the defendant to the plaintiff, who indorsed it in Spain to M. Twelve days after the dishonor of the bill for non-acceptance, M. sent notice to the plaintiff, who, on receipt of the notice, at once notified the defendant. No notice of dishonor by non-acceptance was required by the law of Spain. The Court of Appeal held that the defendant was liable upon his indorsement to the plaintiff, but declined to say whether M. could have charged the defendant in case no notice whatever had been given. Horne *v.* Rouquette, 3 Q. B. D. 514. — Ed.

SAMUEL D. COLT AND ANOTHER v. PARKER BARNARD.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1836.

[*Reported in* 18 *Pickering*, 260.]

ASSUMPSIT. The action was tried before Morton, J.

The plaintiffs offered in evidence a promissory note signed by one Chester Colt, dated in March, 1829, for the sum of $75, payable to the defendant or his order, on June 1st, 1829, and indorsed by the defendant.

It was subsequently admitted that this note was indorsed by the defendant to the plaintiffs on the 21st of August, 1829, some time after it had become due; but it did not appear by direct testimony that any demand of payment had been made on the maker, or that any notice of non-payment had been given to the defendant.

The plaintiffs proved that, at the time when this note was indorsed, the maker was insolvent and had absconded, leaving his family in Pittsfield, where they continued to reside till some time in the autumn of 1829, when he sent for them and removed them into the State of New York; and that about the middle of November, 1829, the note was sent to the State of New York for collection, and that a judgment was there recovered against the maker, but it had not been satisfied.

Gold, for the plaintiffs.

Hubbard and *Lanckton*, for the defendant.[1]

SHAW, C. J., delivered the opinion of the court. It is now conceded that this note was indorsed by the defendant to the plaintiff some time after it became due, and the question is, whether the action can be maintained against the indorser, without a demand on the promisor and notice of non-payment to the indorser. The court are of opinion that the action cannot be maintained without such demand and notice.[2]

[1] The arguments of counsel, which contain little more than a citation of some of the authorities given in the notes to this case, have been omitted. — ED.

[2] Kennon v. McRea, 7 Port. 175; Adams v. Torbert, 6 Ala. 865; Montgomery Bank v. Gaffney, 9 Ala. 158; Jones v. Robinson, 11 Ark. 504; Levy v. Drew, 14 Ark. 334; Beebe v. Brooks, 12 Cal. 808; Thompson v. Williams, 14 Cal. 160; Bishop v. Dexter, 2 Conn. 419; Jones v. Middleton, 29 Iowa, 188; McKewer v. Kirtland, 33 Iowa, 348; Swartz v. Redfield, 13 Kas. 550; Sanborn v. Southard, 25 Me. 409; Greely v. Hunt, 21 Me. 455; Hunt v. Wadleigh, 26 Me. 271; Goodwin v. Davenport, 47 Me. 112; Rice v. Wesson, 11 Met. 400; Davis v. Francisco, 11 Mo. 572 (*semble*); Light v. Kingsbury, 50 Mo. 331; Dwight v. Emerson, 2 N. H. 159; Berry v. Robinson, 9 Johns. 121; Van Hoesen v. Van Alstyne, 8 Wend. 75; McKinney v. Crawford, 8 S. & R. 351; Patterson v. Todd, 18 Pa. 426; Tyler v. Young, 30 Pa.

If the indorser is liable at all on such indorsement, it is in virtue of the law-merchant, which creates a conditional liability to pay, if the maker on presentment shall neglect or refuse to pay, and seasonable notice of such dishonor is given to the indorser. It is very clear that a promissory note is negotiable after it falls due, as well as before. Each indorsement is in the nature of a new draft, by which the holder orders the maker to pay the contents to the indorsee. It is an implied stipulation with the indorsee that the money is still due and payable; that the indorser is entitled to so much money, in the hands of the maker; and, if the indorsee will call upon the maker, he shall receive it. It is like drawing a bill at sight, on which a drawer or indorser cannot be holden without presentment and notice of non-payment. All the reasons which require a demand and notice, in any case, to charge the indorser, apply to this. There is the same reason for prompt notice; namely, that the indorser may take measures to secure payment, if the note is dishonored on presentment.

This precise point, though not decided in this State, has been so decided in other States by very respectable courts, and upon satisfactory reasons, from analogous cases. Course *v.* Shackleford,[1] Poole *v.* Tolleson,[2] Berry *v.* Robinson,[3] M'Kinney *v.* Crawford,[4] Bishop *v.* Dexter.[5] If it be asked at what time payment of the note shall be demanded, the day originally named for payment having passed, the answer is obvious. As between maker and promisee, a note is payable on demand, at any time after it becomes due. When it is indorsed after due, it is in legal effect a note on demand, and is to be so understood by the parties as if written "on demand." In that case, the law is well settled, the demand must be made within reasonable time;[6]

143 (overruling Bank of N. America *v.* Barrière, 1 Yeates, 360, and Jones *v.* Hurst, 12 Pa. 269); Ecfert *v.* Des Coudres, 1 Mill. C. R. 69; Rugely *v.* Davidson, 2 Mill. C. R. 88; Poole *v.* Tolleson, 1 McC. 199; Stockman *v.* Riley, 2 McC. 398; Course *v.* Shackleford, 2 N. & McC. 288; Allwood *v.* Haseldon, 2 Bail. 457; Benton *v.* Gibson, 1 Hill (S. Ca.), 56; Gray *v.* Bell, 2 Rich. 67; Stothart *v.* Parker, 1 Tenn. 260 (*semble*); Union Bank *v.* Ezell, 10 Humph. 885; Nash *v.* Harrington, 2 Aiken, 9, *accord*.

See also Williams *v.* Matthews, 3 Cow. 252; St. John *v.* Roberts, 31 N. Y. 441.

Conf. Morgan Co. *v.* Trebles, 44 Ala. 255 — Ed.

[1] 2 Nott & McCord, 283. [2] 1 McCord, 199.

[3] 9 Johns. 121. [4] 8 Serg. & R. 358. [5] 2 Conn. 419.

[6] In the following cases, the presentment for payment was considered to have been made in reasonable time: Sanborn *v.* Southard, 25 Me. 409 (6 weeks); Goodwin *v.* Davenport, 47 Me. 112 (28 days); Rice *v.* Wesson, 11 Met. 400 (1 month); Van Hoesen *v.* Van Alstyn, 3 Wend. 75 (4 weeks); Union Bank *v.* Ezell, 10 Humph. 885 (1 month).

In the following cases, the presentment for payment was too late: Jones *v.* Robinson, 11 Ark. 504 (1 year); Levy *v.* Drew, 14 Ark. 334 (25 days); Light *v.* Kingsbury, 50 Mo. 331 (2½ months). — Ed.

and, if not paid, immediate notice of non-payment must be given to the indorser.[1] Field v. Nickerson.[2]

No notice having been given to the indorser in the present case, although the note was indorsed after it became due, the action cannot be maintained.

DOWNES AND COMPANY v. EDWARD V. CHURCH.

IN THE SUPREME COURT, UNITED STATES, JANUARY TERM, 1839.

[*Reported in* 13 *Curtis*, 124; 13 *Peters*, 205.]

STORY, J., delivered the opinion of the court.

This is the case of a certificate of division of the judges of the Circuit Court for the district of Mississippi. The action was assumpsit, founded on the second part of a foreign bill of exchange, by the indorsee against the indorser for non-acceptance. The plaintiffs declared upon the second of the set of exchange, which second of the set was protested for non-acceptance, and the same, with the protest attached thereto, was read to the jury. Whereupon, a question arose, whether the plaintiffs could recover upon the said second of exchange without producing the first of the same set, or accounting for its non-production; upon which question, the judges were opposed in opinion. And the same has been accordingly certified to this court under the Act of Congress.

We are of opinion that the plaintiffs are entitled to recover upon the second of the set without producing the first, or accounting for its non-production. No authority has been referred to which is exactly in point, nor are we aware that the question has ever been judicially decided. Mr. Starkie, in his work on Evidence, part 4, p. 228, 1st ed., has said, "In the case of a foreign bill drawn in sets, both the sets should be produced." But for this proposition he has cited no authority. The question must, then, be decided upon prin-

[1] When a bill or note indorsed after maturity has been once presented for payment, and payment refused, the same degree of diligence in sending notice thereof is required, as in the ordinary case of paper dishonored at maturity. Lockwood v. Crawford, 18 Conn. 361; McKewer v. Kirtland, 33 Iowa, 348, *supra*; Lord v. Chadbourne, 8 Greenl. 198; Rice v. Wesson, 11 Met. 400; Poole v. Tolleson, 1 McC. 199; Nash v. Harrington, 2 Aiken, 9.

Van Hoesen v. Van Alstyne, 8 Wend. 75; Brock v. Thompson, 1 Bail. 322; Chadwick v. Jeffers, 1 Rich. 397; Gray v. Bell, 3 Rich. 71, *contra*, are clearly erroneous, as well as Stothart v. Parker, 1 Tenn. 260, where it was held that the insolvency of the maker rendered notice of dishonor unnecessary in the case of a note indorsed after maturity. — ED.

[2] 18 Mass. R. 131.

ciple. The object of drawing a foreign bill in sets is for the convenience of the payee, or other holder, to enable him to forward the same for acceptance by different conveyances, and thus to guard against any loss, by accident or otherwise, which might occur, if there were but a single bill. But, from the very frame of the set, if one is paid or discharged by the acceptor, or other party liable on it, he is ordinarily discharged from the others, since each part contains a condition that it shall be payable only when the others remain unpaid.[1] Now, when one of the set is protested for non-acceptance, and due notice is given to an indorser, and, on the trial of an action brought against him by the indorsee, the same bill of the set on which the protest is made is produced, that is *prima facie* proof of his being responsible thereon. Either of the set may be presented for acceptance, and, if not accepted, a right of action presently arises upon due notice against all the antecedent parties to the bill, without any others of the set being presented; for it is by no means necessary that all the parts should be presented for acceptance before a right of action accrues to the holder. Under such circumstances, it is properly a matter of defence on the other side to show either that some other bill of the set has been presented and accepted, or paid; or that it has been presented at an earlier time and dishonored, and due notice has not been given; or that another person is the proper holder, and has given notice of his title to the party sued; or that some other ground of defence exists, which displaces the *prima facie* title made out by the plaintiff. The law will not presume that the other bills of the set have been negotiated to other persons, merely because they are not produced. And the indorser is not put to any hazard or peril by the non-production of them; since, like the acceptor, if he once pay the bill, without notice of any superior adverse claim, by a negotiation of another of the set to another party, he will be completely exonerated. On the other hand, great inconveniences might arise from compelling the plaintiff to produce the other parts of the set, or to account for their non-production, as he might not be able satisfactorily to prove that they had not been negotiated, or that they had been lost. In short, if the plaintiff, before he could recover, were required to produce or to account for all the parts of the set, he would be obliged, in every case where the bills had been transmitted by different conveyances abroad, to arm himself with proofs of every stage of their route and progress, until they should come back again into his hands, as preliminaries to his right to recover upon their being dishonored. Such a requirement would create most serious embarrassments in all

[1] Page v. Warner, 4 Cal. 395; Durkin v. Cranston, 7 Johns. 442; Wells v. Whitehead, 15 Wend. 527 (*semble*), *accord*. — Ed.

commercial transactions of this sort; and, instead of bills drawn in sets being a public convenience, they would be greatly obstructed in their negotiability, since the rights and the remedies of the holder might be materially impaired thereby. We are therefore of opinion that the question upon which the judges of the Circuit Court were opposed ought to be answered in the affirmative, and we shall send a certificate to the court accordingly.[1]

ROBERTS v. AUSTIN.

IN THE SUPREME COURT, PENNSYLVANIA, FEBRUARY 15, 1840.

[*Reported in* 5 *Wharton*, 318.]

ERROR to the District Court for the city and county of Philadelphia, to remove the record of an action on the case, brought by Charles B. Austin against William Roberts, Jr., to March term, 1838, of that court.

On the 7th of March, 1838, the plaintiff filed in the office of the prothonotary of the District Court a copy of the instrument upon which the action was brought, and which was as follows: —

"Dolls. 137 50. KENSINGTON, PHILADA., October 1st, 1836.

"Four months after date, pay to the order of Mr. Charles B. Austin, agent of the Union Glass Works, one hundred and thirty-seven dollars and fifty cents, for value received, and charge the same to the account of, Yours, &c.,

"WM. ROBERTS, JR.

"Mr. RICHARD JUKES, Newark, N. J."

Across the face was written, "Accepted, for Richard Jukes. Richard Jukes, Jr."

Indorsed, "Chas. B. Austin, agt. Union Glass Works."

The defendant then filed the following affidavit of defence:[2] —

"William Roberts, Jr., the defendant in the above-named action, being duly sworn according to law, saith that he hath, to the best of his knowledge and belief, a just and legal defence to the whole of

[1] In Wells v. Whitehead, 15 Wend. 527, a holder who declared upon the first of a set of three bills, the second of which had been protested, was held not entitled to maintain an action against an indorser without producing or accounting for the non-production of the second of the set. — ED.

[2] A portion of the case relating to a question of procedure has been omitted — ED.

the plaintiff's claim, the nature and character of which defence are as follows:—

"The defendant, as agent for a certain Richard Jukes of Newark, New Jersey, purchased of the plaintiff certain merchandise; and this defendant saith that the name of his principal was disclosed by him to the plaintiff at and before the time of said purchase; and that the said merchandise was furnished to his said principal upon the credit and for the use of his said principal. And this defendant further says that the bill of exchange upon which this action has been founded, and of which a copy has been filed by the plaintiff, was given by the defendant to the said plaintiff, in payment for the said merchandise so purchased as aforesaid. The defendant therefore avers that he has received no consideration whatever for the said bill, and is not indebted to the plaintiff on this or any other behalf."

The District Court, after argument, gave judgment for the plaintiff, for want of a sufficient affidavit of defence. Whereupon, the defendant took this writ of error, and filed the following exceptions:—

"1. Because the affidavit of defence disclosed facts, which furnished a legal defence to the demand of the said plaintiff.

"2. Because the plaintiff and defendant below, being original parties to the bill of exchange upon which this action was instituted; and the said defendant, as set forth in the said affidavit, not having received any consideration for the same, the said defendant was not liable to the said plaintiff for the payment of the said bill.

"3. Because the said plaintiff, as set forth in the said affidavit, knew that the said defendant purchased the goods for the value of which the said bill was given, as agent for a certain Richard Jukes, to whom and upon whose credit they were accordingly furnished."

Mr. Broom, for the plaintiff in error, argued

That the affidavit of defence was sufficient. Story on Agency, 260. Meyer *v.* Barker,[1] *Ex parte* Harcroft,[2] Kidson *v.* Dilworth,[3] Hopkins *v.* Mehaffy.[4]

Mr. C. Ingersoll, contra, cited Philadelphia Library Co. *v.* Ingham,[5] Miller *v.* Spreeher,[6] Campbell *v.* Baker.[7]

The opinion of the court was delivered by

ROGERS, J. It is a well-established rule of law that, when an agent names his principal, the principal is responsible, not the agent. But the agent must name his principal as the person to be responsible. It is alleged that the affidavit of defence is defective in this particular,

[1] 6 Binn. 234.
[2] 12 Ves. 352.
[3] 5 Price, 564; 2 Eng. Exch. Rep. 311.
[4] 11 Serg. & Rawle, 126.
[5] 1 Wharton, 72.
[6] 2 Yeates, 162.
[7] 2 Watts, 88.

that the defendant omits to aver that the goods were sold on the credit of the principal alone. The affidavit must receive a reasonable construction, and the words used must be understood in their ordinary sense. Giving its language its usual import, the defendant substantially avers that the principal alone was held responsible; that the bill of exchange was intended by both the contracting parties in the nature of an order on the principal for the money, without any idea that in any event the drawer was to be liable on the bill. The defendant says that the name of his principal was disclosed by him to the plaintiff, at and before the time of the purchase. "The merchandise was furnished to his principal upon the credit and for the use of his principal." As there can be no doubt the defendant meant to assert that the goods were furnished for the use of the principal alone, it is equally clear that we must understand him to say that they were furnished on his credit alone. It is the obvious and natural import of the language of the affidavit. They constitute one sentence, and the same construction must be applied to each. If this was the contract, the face of the instrument cannot alter the case, as is held in Emmet *v.* Sharp.[1] As between the immediate parties, the drawer may be discharged by proof *aliunde*, from the liability arising on the face of the bill itself.

Judgment reversed and a procedendo awarded.[2]

J. & J. H. PECK AND LYMAN & MARSH *v.* MAYO, FOLLETT, & Co.

IN THE SUPREME COURT, VERMONT, JANUARY, 1842.

[*Reported in* 14 *Vermont Reports*, 33.]

THE opinion[3] of the court was delivered by

REDFIELD, J. This action is upon a promissory note, made in Montreal, where the legal rate of interest is six per cent, payable at the M. & F.'s Bank, in the city of Albany, where the legal rate of in-

[1] 5 Whart. 288.

[2] Krumbhaar *v.* Ludeling, 8 Mart. 640; Wolfe *v.* Jewett, 10 La. 888; Mobley *v.* Clark, 28 Barb. 390; Miles *v.* O'Hara, 1 S. & R. 32, *accord*.

Hancock *v.* Fairfield, 30 Me. 299; Smyth *v.* Spalding, 18 Mo. 529 (overruled in McAllister *v.* Budd, 33 Mo. 417), *contra*.

See Knott *v.* Venable, 42 Ala. 186.

Conf. Mayhew *v.* Prince, 11 Mass. 54. — ED.

[3] All that is material to the understanding of the case being contained in this opinion, the rest of the case has been omitted. — ED.

terest is seven per cent, and indorsed by the defendants in this State, where the legal rate of interest is six per cent. This action being against the defendants, as indorsers, the only question is, what rate of interest are they liable for? The note was payable at a day certain, but no interest stipulated in the contract. The interest claimed is for damages in not paying the money when due.

The first question naturally arising in this case is, What rate of interest, by way of damages, are the signers liable for? There are fewer decisions to be found in the books, bearing directly upon this subject, than one would naturally have expected. It is an elementary principle, upon this subject, that all the incidents pertaining to the validity and construction, and especially to the discharge, performance, or satisfaction of contracts, and the rule of damages for a failure to perform such contract, will be governed by the *lex loci contractus*. This term, as is well remarked by Mr. Justice Story, in his Conflict of Laws, 248, may have a double meaning or aspect; and that it may indifferently indicate the place where the contract is actually made, or that where it is virtually made, according to the intent of the parties, that is, the place of performance. The general rule now is, I apprehend, that the latter is the governing law of the contract. Hence, the elementary principle undoubtedly is that the rate of interest, whether stipulated in the contract, or given by way of damages for the non-performance, is the interest of the place of payment.[1] . . .

Having thus, as we think, satisfactorily shown that the settled rule of law upon this subject will render the makers of these notes liable for the interest of the State of New York, it is needless to spend time in regard to the defendants, who are the first indorsers, and thus stand in the place of the drawer of a bill of exchange. The contract of the drawer of a bill, and the indorser of a note, is collateral to that of the acceptor or maker. They promise to pay upon his failure, and proper proceedings had. Chancellor Kent says, "The engagement of the drawer and indorser of every bill is that it shall be paid at the proper time and place; and, if it be not, the holder is entitled to indemnity for the loss arising from this breach of contract." Such is the language of all the books upon the subject, and such is the only rule which can be made to look reasonable, or to consist with justice. It must sound

[1] The learned judge here referred to 2 Kent Com. 460, 461; Thompson v. Powles, 2 Sim. 194; Harvey v. Archbold, Ry. & M. 184; Depau v. Humphreys, 20 Mart. 1; Story, Confl. Laws, 243, 246; Boyce v. Edwards, 4 Pet. 111; Andrews v. Pond, 13 Pet. 65; Hosford v. Nichols, 1 Paige, 220; Bank of U. S. v. Daniel, 12 Pet. 32; Robinson v. Bland, 2 Burr. 1077; Fanning v. Consequa, 17 Johns. 511; Schofield v. Day, 20 Johns. 102, to show that the elementary principle above stated was abundantly supported by authority. — Ed.

strangely in the ears of a lawyer, that these plaintiffs may here recover of the defendants the principal sum, and six per cent interest, and that the makers of the note are still liable for the additional one per cent; or that while, by the terms of the contract, the makers were and are bound to pay seven per cent interest, the plaintiffs, if they will sue the indorsers, must put up with less, and that in satisfaction of the entire contract. If the rate of interest in Vermont were ten per cent, could any man suppose the defendants in this case liable for that rate of interest? No man, I apprehend, doubts that the indorser of a note or bill is liable in regard to the principal debt to the same extent as the original debtor. The counsel on both sides agree in this point. The only objection which has been urged to this rule in regard to the rate of interest, which has seemed to me at all embarrassing, is that it will enable persons fraudulently to evade the usury laws sometimes. This apprehension induced the courts in Westminster Hall, for many years, to introduce an exception into the rules of construing contracts upon this subject, and even to declare all contracts entered into in England, and stipulating for a higher rate of interest than that there allowed, to be void under the statutes against usury. Dewar *v.* Span.[1] Chancellor Kent, in a recent note to the 4th edition of his Commentaries (vol. 2, p. 461), says, "This principle has much to recommend it for reasonableness, convenience, and certainty, except in cases where the whole arrangement was evidently and fraudulently intended as a cover for usury." Such cases should be treated like other fraudulent attempts to evade the usury laws. But I apprehend that a contract made *bona fide* in one country and to be performed in another, and stipulating the higher rate of interest of the latter, is not usurious with reference to the laws of the former country. A contract to be usurious, by our law, must not only be made here, but to be performed here. We regret that the members of the court, after two arguments, should not be more unanimous; but the judgment here pronounced is that of a majority of the members.

Judgment reversed and new trial, unless the parties consent to enter judgment according to the rule entered into in the County Court.

By consent, judgment for plaintiff according to the rule.[2]

[1] 3 T. R. 425.

[2] Bank of Illinois *v.* Brady, 3 McL. 268 (*semble*); Mullen *v.* Morris, 2 Barr, 85, *accord*. — Ed.

HICKS v. HINDE AND OTHERS.

IN THE SUPREME COURT, SARATOGA SPECIAL TERM, NEW YORK, BEFORE PAIGE, J., OCTOBER, 1850.

[*Reported in* 9 *Barbour*, 528.]

THIS was an action brought upon a draft, dated Aug. 1, 1848, drawn by the defendant Hinde as agent, on the defendant L. T. Beardsley, in favor of the plaintiff Hicks, for $120.82. Hinde signed the draft, "John Hinde, agent." The draft was accepted by Beardsley, but was not paid by him when it became due. It was protested for non-payment, and notice was given to Hinde. Hinde, at date of the draft, had charge of a factory in Waterford, for Beardsley, as his agent. Beardsley authorized Hinde to draw the draft as his agent. It was drawn for rent due by Beardsley to Hicks. Hicks, Hinde, and Beardsley were together at the time the draft was given, and accepted by Hicks. When he accepted the draft, Hicks knew that Hinde was Beardsley's agent, and that Hinde was authorized by Beardsley to draw the draft as his agent, and that he signed it as such agent. The plaintiff objected to all parol evidence in relation to the draft. The cause was tried by the court, a jury being waived by the parties.

E. F. Bullard, for the plaintiff.

W. H. King, for the defendant Hinde.

PAIGE, J. It is insisted, on the part of the plaintiff, that Hinde is personally liable on the draft, as it does not appear on the face of the draft that he signed it as agent of Beardsley. It is also insisted that parol evidence is inadmissible to explain, add to, or vary the draft. The case of Pentz v. Stanton [1] is cited in support of these propositions. In that case, one West was the agent of a manufacturing establishment, and as such purchased a quantity of dyestuffs for the use of the factory, without disclosing the name of his principal, and the bill of goods was made out against West as agent, without stating the name of the principal, and West as agent drew a draft on one Carey, in favor of the plaintiff, for the price of the goods, and signed the draft, "H. F. West, agent." The name of the principal was not disclosed to the plaintiff by the agent at the time of the purchase of the goods and giving of the draft, and the agent did not inform the plaintiff that he was authorized by his principal to draw the draft as his agent. In this case, the name of the principal was disclosed, and the plaintiff knew that Hinde was authorized by Beardsley, his prin-

[1] 10 Wend. 271.

cipal, to draw the draft in question as his agent, and that he actually signed it as such agent. It appeared from the evidence that Hinde did not intend to bind himself personally. If he had added to his signature "agent for L. T. Beardsley," instead of agent merely, it will be conceded that he would not have been personally bound. Brockway *v.* Allen,[1] Randall *v.* Van Vechten,[2] Skinner *v.* Dayton,[3] Bank of Columbia *v.* Patterson,[4] White *v.* Skinner;[5] 2 Kent's Com. 630, and note *a*, 6th ed.; 4 Wend. 285; 15 Johns. 1. A contract not necessary to be in writing under seal will be binding on the principal, if it appears in any part of the instrument that it was intended to be executed by his agent for him, in the character of agent merely. Evans *v.* Wells,[6] *per* Chancellor Walworth. The case of Hills *v.* Bannister[7] was overruled by the case of Brockway *v.* Allen.[1] If, in Taft *v.* Brewster,[8] it had been shown that the Baptist Society of Richfield was a corporation, and that the bond given by the defendants was given for a corporate debt, and that the defendants were authorized to execute the bond, they, as the law is now understood, could not have been held to be personally liable. In Mott *v.* Hicks,[9] where a note was made payable to J. Horsefield or order, and indorsed by him "J. Horsefield, agent," it was held that although nothing appeared to show that he was in fact agent, yet he was not liable as indorser. The indorsement was regarded as special, and equivalent to a declaration that the indorser would not be personally liable. 1 Cowen, 534, 538. The acceptor of a bill of exchange, like the maker of a note, is considered as the original and principal debtor, and primarily liable; and the drawer and indorsers are considered as sureties, liable as such, guaranteeing the performance of the principal's contract. Chitty on Bills, 26, 192. The engagement of the drawer, like that of an indorser, is conditional; viz., that he will pay the bill, provided it is presented in proper time to the acceptor and he fails to pay it, and provided also that he is duly notified of the dishonor of the bill. 20 John. 366. The drawer may, like an indorser, add to his signature restrictive or qualifying words, to exempt himself from personal liability. Chitty on Bills, 32–34, 234. A transfer by indorsement of a bill is equivalent in its effect to the drawing of a bill; the indorser being, in almost every respect, considered as a new drawer on the original drawee. Chitty on Bills, 241; 1 Salk. 133. And a promissory note indorsed may be declared on as a bill of exchange. The maker of the note stands in the situation of the acceptor of a bill. Chitty on Bills, 241, 242. The obligation which an

[1] 17 Wend. 40.
[2] 19 John. 60.
[3] 19 John. 554, 548.
[4] 7 Cranch, 299, 307.
[5] 13 John. 307.
[6] 22 Wend. 335.
[7] 8 Cowen, 31.
[8] 9 John. 344.
[9] 1 Cowen, 514.

indorsement imposes on the indorser to the indorsee, and the mode in which that obligation may be extinguished, is in all respects exactly similar to that which a drawer of a bill is under to the payee. And Lord Ellenborough, in Ballingalls v. Gloster, says, "When it is laid down that an indorser stands in all respects in the same situation as a drawer, all the consequences follow which are attached to the situation of the latter." Chitty on Bills, 241, 242, 10th Am. from 9th Lond. ed. If the drawer of an accepted bill is, like an indorser, considered as a surety, and stands in all respects in the same situation as an indorser, and may like an indorser add to his signature restrictive or qualifying words to exempt himself from personal liability, it would seem necessarily to follow that whatever restrictive or qualifying words exempt an indorser from personal liability will have a like effect upon a drawer, when added to his signature. If this proposition cannot be disputed, then the case of Mott v. Hicks[1] disposes of this case. There the addition by the indorser, to his indorsement, of the word "Agent," was held to be equivalent to a declaration that he would not be personally liable. Why should not, upon principle, the same effect flow from the addition of the same word by Hinde to his signature to the draft in question?

There are some cases of ambiguities, where the words are equivocal, but which admit of precise and definite application by resorting to the circumstances under which the instrument was made. In such cases, parol evidence is admissible of the circumstances attending the transaction. 2 Cow. & Hill's Notes, 1358; Persil v. Dickson.[2] In Storer v. Logan,[3] being an action by the payee against the drawee of a bill of exchange, parol evidence was received of verbal conditions and restrictions, subject to which an absolute written engagement of the drawee to accept the bill was made, such verbal conditions and restrictions having been communicated to the payee by the drawer at the time the bill was drawn. So, in case of a blank indorsement of a note or bill of exchange, contemporaneous parol stipulations showing that the indorsement was intended to be restrictive are admissible in evidence, upon the principle that the written engagement is left incomplete by the parties. 2 Cowen & Hill's Notes, 1473; 11 Mass. 31.

In Louisiana, a person may draw as agent, upon his principal, for a debt not personal to himself, but due by the principal to the payee, without expressing the agency on the face of the bill. Wolfe v. Jewett.[4] In the Mech. Bank of Alexandria v. The Bank of Columbia,[5] where a check was drawn by a person who was the cashier of a bank,

[1] 1 Cowen, 514. [2] 1 Mason's Rep. 10 to 12. [3] 9 Mass. 55.
[4] 10 Curry, Louis. Rep. 383. [5] 5 Wheat. 326.

but without affixing to his signature his title of cashier, parol evidence was received to show that he signed the check as cashier.

But I prefer to place the decision of this case upon the ground that the drawing of the draft by Hinde is restrictive; and that the addition of the word "agent" was, as was held in Mott v. Hicks, equivalent to a declaration that he would not be held personally responsible on the draft. This case may be distinguished from the case of Pentz v. Stanton. In that case, the name of the principal was not disclosed to the vendor, by the agent, at the time of the purchase of the goods and giving of the draft for the price of the goods. The non-disclosure of the principal made the agent personally liable for the goods. And, being so liable, it was proper he should be held personally liable on the draft. Dunlap's Paley on Agency, 371; 2 Kent's Com. 630; 20 Wend. 434, *per* Chancellor. In the case of Stackpole v. Arnold,[1] the agent affixed his own signature to the promissory notes on which the suit was brought, without any superadded restrictive or qualifying words; and at the time he gave the notes he did not disclose to the payee the name of his principal. Neither that case, nor either of the other cases relied on in the case of Pentz v. Stanton, resemble the present case.

Upon the whole, I have come to the conclusion that the defendant Hinde is not personally liable on the draft in question. Judgment must therefore be entered in his favor.[2]

BABCOCK AND OTHERS v. BEMAN.

IN THE COURT OF APPEALS, NEW YORK, JUNE, 1854.

[*Reported in* 11 *New York Reports*, 200.]

APPEAL from a judgment of the New York Common Pleas. Babcock and others sued Beman, as indorser of a promissory note made by Adam Smith & Co., and payable to Beman. The complaint set forth the facts necessary to charge the defendant as indorser, taking no notice of the addition annexed to his name in the body of the note and in the indorsement, as hereafter mentioned. The answer averred that the note and indorsement were in the following words: —

[1] 11 Mass. Rep. 27.

[2] McAllister v. Budd, 33 Mo. 417 (overruling Smyth v. Spalding, 13 Mo. 529), *accord*.

Tucker Co. v. Fairbanks, 98 Mass. 101; Tannatt v. Rocky M't. Bank, 1 Col. T. 278, *contra*. — ED.

"Four months after date, we promise to pay to the order of R. Beman, *Treas.*, five hundred dollars, value received.

"ADAM SMITH & Co."

Indorsed, "R. BEMAN, *Treasurer.*"

The answer further alleged that the defendant was the treasurer of the Union Manufacturing Company at Raritan,—a corporation created under the laws of New Jersey,—and as such had authority to receive the note and to indorse it to the plaintiffs, of which they had notice; that the company was indebted to the plaintiffs for goods sold; that the defendant, having received the note as treasurer of the company, indorsed it as treasurer, and not individually, and that the plaintiffs received it as an obligation of the company, on account of said debt, and not otherwise.

The plaintiffs demurred, alleging that the answer did not set forth any defence. The Common Pleas gave judgment for the defendant; and the plaintiffs appealed to this court.

A. F. Smith, for the appellants.

Thomas Darlington, for the respondent.

DENIO, J. The indorsement of a promissory note, or bill of exchange, effects two different and distinct purposes. It is a present transfer and assignment of the paper to the indorsee, and an executory contract by which the indorser agrees, upon certain conditions, to pay the amount of the note or bill himself. There can be no regular indorsement which does not *ipso facto* transfer the paper; but it is not absolutely essential that it should also contain the collateral contract. Chitty on Bills, 254; Rice *v.* Stearns. The defendant in this case indorsed the note in question by writing his name upon it, and adding the word "treasurer," and the note itself was payable to him, with the addition of the usual abbreviation of the same word. The answer shows that the defendant, when he made the indorsement, was the treasurer of a manufacturing corporation, and that this was known to the plaintiffs, who received the note thus indorsed on account of a demand which they had against the corporation. The question is whether this was a qualified indorsement, passing, as it clearly did, the interest in the note, but without any other contract on the part of the defendant. This question was decided against the plaintiffs in the Supreme Court more than thirty years ago, and has since been acquiesced in by the profession; and, I have no doubt, has been extensively acted on by business men. In Mott *v.* Hicks,[1] the only material question was whether a witness named Houseman was competent to testify, he having been objected to on the ground of interest. He had

[1] 1 Cowen, 513.

indorsed a note made by a manufacturing corporation, payable to his order, adding to his name the word "agent." His name as payee in the note had no addition annexed to it, but it was proved that the plaintiff was privy to the consideration upon which it was given and indorsed; and that consideration was a debt due from the corporation. If Houseman was personally liable on this indorsement, he was interested and incompetent as a witness; otherwise, he was not. The court held that it was a qualified indorsement, operating as a transfer of the note, but not containing a contract to pay. Chief Justice Savage dissented, on the ground that it had not been proved, except by Houseman himself, that he was agent of the company, and that the note was payable to him individually. In these two particulars, the situation of this defendant is more favorable than that of Houseman. It has been held that an indorsement of a note to the cashier of a moneyed corporation, by adding the word "cashier" to his name in the indorsement, is a transfer to the corporation, where that was the design of the transaction. Watervliet Bank *v.* White.[1] So this note before the indorsement may be considered as having been the property of the manufacturing corporation, it being substantially averred that such was the nature and intent of the transaction upon which it was given. The case of Mott *v.* Hicks is, therefore, a direct adjudication upon this very point, by the highest court of original jurisdiction in this State; and it has been acquiesced in and regarded as the law for a great length of time. The question was, in the highest degree, practical, and of more frequent occurrence than almost any other. It, moreover, related to commercial paper, in respect to which it is of the utmost importance that the decisions of the courts should be stable, so that they may be relied on with confidence by the community. We should be therefore most reluctant to depart from the principle of the case, even could it be successfully questioned as not in harmony with legal analogies or antecedent cases. We think, however, it is not subject to any such criticism. It has been followed in principle in Brockway *v.* Allen[2] and in Hicks *v.* Hinde, and has not been questioned, so far as we know, by any case.

The judgment of the Common Pleas should therefore be affirmed.

EDWARDS, J., also delivered an opinion in favor of affirmance.

JOHNSON, PARKER, and ALLEN, JJ., concurred.

SELDEN, J., was in favor of reversing the judgment.

GARDINER, C. J., and RUGGLES, J., took no part in the decision.

Judgment affirmed.[3]

[1] 1 Denio, 608.

[2] 17 Wendell, 41.

[3] Mott *v.* Hicks, 1 Cow. 513, 537–539; Davis *v.* Henderson, 25 Miss. 549; Bowne *v.* Douglass, 88 Barb. 312, *accord*.

See Fassin *v.* Hubbard, 55 N. Y. 465. — ED.

BOWEN AND OTHERS v. NEWELL.

IN THE COURT OF APPEALS, NEW YORK, DECEMBER, 1855.

[*Reported in* 13 *New York Reports*, 290.]

ACTION in the Superior Court of the city of New York against the drawers and indorser of an instrument of which the following is a copy:—

"$2,000. NEW YORK, Oct. 5, 1849.

"Cashier of Thompson Bank,

"Pay Zenas Newell, or order, two thousand dollars, on the 12th inst.

(Signed) "B. SEARLS & SON."

(Indorsed) "ZENAS NEWELL."

Newell defended on the ground that he was not charged as indorser. The action was twice tried. Upon the first trial, the plaintiff had judgment, which was reversed by this court. See 4 Selden, 190. The cause was again tried, when judgment again was rendered in favor of the plaintiff. See 2 Duer's S. C. R. 584, for a statement of the case, and the reasons of the court below for the judgment. From this judgment, the defendant, Newell, appealed to this court.

The Thompson Bank was a banking institution located and doing business in the State of Connecticut. The drawers of the check were accustomed to keep an account and do business with it. They, as also the indorser and the plaintiffs, did business in the city of New York. The check was drawn, indorsed, and negotiated to the plaintiffs in that city the day it bears date. It was presented at the Thompson Bank for payment, and payment was there demanded and refused on the 12th of October, and notice of such presentment, demand, and refusal was then given to the drawers and indorser. The opinion of Johnson, J., states sufficiently the other facts on which the decision of the case in this court depended.

C. T. Porter, for the appellant.

Asa Child, for the respondents.

JOHNSON, J. When this case was before this court upon a former occasion, its discussion and decision chiefly involved the inquiry whether, by the law-merchant, the instrument declared on was such that days of grace were or were not to be allowed upon it. Upon that question, we were of opinion that it was entitled to days of grace. We were further of opinion that the usage of the Thompson Bank did not control the rights of the parties in this respect.

As the case now presents itself, it appears that, by the law of the State of Connecticut, where this paper was to be paid, it was payable

upon the day when, by its tenor, it became due, without grace. What the law of a foreign country is can only be determined upon evidence: it is a question of fact. The Superior Court has decided upon evidence, derived from the best sources, and of the most unquestionable character, that such is the law of Connecticut, and we see no ground to doubt the correctness of that conclusion. Nor is there any more room to doubt that, by the law of this State, the law of Connecticut is to control and govern, in respect to the allowance of grace upon a bill of exchange or check drawn upon and payable at a bank in that State. Story, Conf. of Laws, 2d ed. § 361.

The judgment should be affirmed. *Judgment accordingly.*[1]

WOOD, BACON, & CO. v. KELSO.

IN THE SUPREME COURT, PENNSYLVANIA, 1856.

[*Reported in* 27 *Pennsylvania Reports*, 241.]

ERROR to the Court of Common Pleas of Erie County.

This case arose upon the following case stated: —

"Now, to wit, May 19, 1856, it is agreed by and between the parties to this suit by their attorneys that judgment shall be entered in this case against the defendant and in favor of the plaintiffs, and liquidated at the sum of ten hundred and forty-one dollars and twenty-six cents, with costs of suit, release of errors, &c., with interest from this date.

"It is further agreed that the note upon which this suit was brought was made at Erie, Pennsylvania, to be paid at the Merchants' Bank in the city of New York (*pro ut*, copy annexed). It is further agreed that the exchange between the cities of Erie and New York is one-half of one per cent in favor of New York. It is further agreed to submit to the Court of Common Pleas the question whether the plaintiffs are entitled to recover in this suit the exchange on New York, in addition to the debt and interest. If so, the court is to increase the amount of the judgment as liquidated above to the sum of ten hundred and forty-six dollars and forty-five cents, with costs, &c. If not, then judgment to remain at the amount above liquidated, either party to be entitled to a writ of error."

[1] Washington Bank *v.* Triplett, 1 Pet. 25; Thorp *v.* Craig, 10 Iowa, 461; Goddin *v.* Shipley, 7 B. Mon. 575; Vidal *v.* Thompson, 11 Mart. 23, 24 (*semble*); Cribbs *v.* Adams, 13 Gray, 597 (*semble*); Bank of Orange *v.* Colby, 12 N. H. 520; Hatcher *v.* McMorine, 4 Dev. 124 (*semble*); Bryant *v.* Edson, 8 Vt. 325; Blodgett *v.* Durgin, 32 Vt. 361; Walsh *v.* Dart, 12 Wis. 635, *accord*. — ED.

Copy of Note.

"ERIE, PA., January 9, 1855.

"Protested for non-payment." $965.94.

"Three months after date, value received, I promise to pay to the order of Edwin J. Kelso, at the Merchants' Bank in the city of New York, nine hundred sixty-five $\frac{94}{100}$ dollars. J. H. FULLERTON."

Indorsed, "EDWIN J. KELSO."

Upon which the court below (GALBRAITH, P. J.) entered judgment in favor of the defendant; which entry of judgment was assigned for error in this court.

Grant, for plaintiffs in error. The defendant is an indorser of the note, and hence a new maker and an original promisor. Byles on Bills, 113, 117. This is a promise by him to deliver the amount of money in the note mentioned, according to its terms. He did not do it, and the plaintiffs are entitled to be reimbursed the damages actually sustained. Andrews *v.* Pond,[1] Bank of the United States *v.* Daniel,[2] Mellish and Another *v.* Simeon; 3 Kent, chap. 44, tit. "Of the Measure of Damages," 7 ed. p. 151; Grimshaw *v.* Bender;[3] Code de Commerce, b. 1, tit. 8, 177, 186; Pardessus, Droit Comm. t. II. art. 437; Grant *v.* Healey,[4] Canegie *et al. v.* Morrison *et al.*;[5] Story on Bills, § 152; Taan *v.* Le Gaux,[6] Cropper *v.* Nelson,[7] Stuart *v.* Ralston,[8] Denston *v.* Henderson,[9] Graves *v.* Dash;[10] Chitty on Bills, 424; Byles on Bills, 329.

Babbitt, for defendant, contended that exchange was not allowable on promissory notes, and referred to Martin *v.* Franklin,[11] Schofield *v.* Day,[12] Adams *v.* Cordis;[13] Act of 30th March, 1821, and 13th May, 1850, relative to damages on bills; Lloyd *v.* McGarr.[14]

January 10, 1857, the opinion of the court was delivered by

LOWRIE, J. The difference of exchange is uniformly allowed on bills of exchange, unless where there is a statutory substitute for it; but the cases cited from New York and Massachusetts show that the rule there does not extend to other kinds of debts, and according to one of them, 20 Johns. 102, not even to promissory notes payable at a particular place. Those cases even restrict the recovery by measuring

[1] 18 Pet. 76. [2] 12 Pet. 54, 55.

[3] 6 Mass. 162; note to Id.: "Where a balance is due on an account payable in a foreign country, the creditor, if he sues for the same in another country, is entitled to be paid at the rate of exchange."

[4] 3 Sum. 523. [5] 2 Met. [6] 1 Y. 204.

[7] 3 W. C. C. R. 125. [8] 2 Miles, 258. [9] 13 Johns. 322.

[10] 13 Johns. 16. [11] 4 Johns. 125. [12] 20 Johns. 102.

[13] 8 Pick. 260. [14] 3 Barr, 482.

the pound sterling at the par of exchange, $4.44, and not at the real or current value, $4.80, or more. Yet Story (Conf. of Laws, §§ 308–313, Bills of Exchange, §§ 150–152) and Sedgwick (Damages, 240) show that the weight of authority is decidedly against these results, and we do not find any cases that support them.

Our own case of Lee v. Wilcocks [1] is not clearly reported; but the exchange value at least was allowed in a case of foreign money, and the court calls this the settled rule. It was allowed on a common debt in Smith v. Shaw;[2] and, in Delegal v. Naylor,[3] the exchange value of foreign money and the rate of exchange or transmission were allowed, and the court ordered the prothonotary to calculate the difference.

We content ourselves with a mere reference to the other cases: 3 Wheat. 146; 1 Bald. 302; 3 Sumn. 523; 2 B. & Ad. 78; 1 P. Wms. 395; 2 Bro. P. C. 72; 11 Ves. 314; 1 Eq. Ca. Ab. 288; 2 Id. 533. See also 2 McLean, 581; 3 Bos. & P. 335. These cases seem to include all sorts of cases where money is properly payable in one place, and the creditor is under the necessity of resorting to another place to collect it; and they allow the difference of exchange. But we confine ourselves to the question before us, and decide that where a promissory note is made expressly payable at a particular place, and is dishonored there, so that the holder is compelled to seek payment elsewhere, he is entitled to the difference of exchange, if there be any. In such a case, we always allow interest according to the law of the place appointed for payment; and the difference of exchange is sometimes a more important element, and its allowance is essential to a full performance of the contract, and we do not see why it should be refused.

The judgment of the Court of Common Pleas is reversed, and judgment is now here entered for the plaintiffs for the sum of $1,046, with interest from the 19th May, 1856, and costs, and the record is remitted for execution.[4]

[1] 5 Ser. & R. 48. [2] 2 W. C. C. R. 167. [3] 7 Bing. 460.

[4] Howard v. Central Bank, 3 Ga. 375, *accord.*

Loud v. Merrill, 47 Me. 351, *contra.*

Whenever an action is brought in one jurisdiction to recover money payable in another jurisdiction, the amount of the plaintiff's judgment will vary according to the actual rate of exchange between the two jurisdictions. Scott v. Bevan, 2 B. & Ad. 78; Cash v. Kennion, 11 Ves. 314; Delegal v. Naylor, 7 Bing. 460; Grant v. Healey, 3 Sumn. 523 (*semble*); Smith v. Shaw, 2 Wash. C. C. 167; Lee v. Wilcocks, 5 S. & R. 48.

The contrary view, adopted in the following cases, — Chumasero v. Gilbert, 24 Ill. 651; Martin v. Franklin, 4 Johns. 124; Schofield v. Day, 20 Johns. 102; Adams v. Cordis, 8 Pick. 260; Alcock v. Hopkins, 6 Cush. 484; Lodge v. Spooner, 8 Gray, 166; Hussey v. Farlow, 9 All. 263; Burgess v. Alliance Co., 10 All. 221, — would seem to be based upon no legal principle.

In Grant v. Healey, *supra*, Story, J., said, p. 524: "The very rate of exchange

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PRESIDENT, DIRECTORS, AND COMPANY OF THE PRESCOTT BANK v. ROBERT B. CAVERLY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1856.

[*Reported in* 7 *Gray*, 217.]

ACTION of contract against the second indorser of a bill of exchange, dated February 13, 1855, drawn by Adams & Co., in California, on themselves, in Boston, and payable at sight to the order of Adeline Hall, of Lowell, who was a married woman.

At the trial in the Court of Common Pleas, before Mellen, C. J., the plaintiff's cashier testified that the defendant brought this bill to their bank about three o'clock in the afternoon of Saturday, March 17, 1855, after the close of their banking hours, and when the bank was open as a savings bank only, and there put his name on the back of the bill.

The defendant testified that he never had any interest in the draft in suit; that it was brought to him at his office, with the payee's name upon it, and he, at the payee's request, carried it immediately to the plaintiffs, and received the money for the payee, and returned and delivered it to her for her own use, and she took and carried it away; that the plaintiff's teller, who received the draft and paid out the money, knew the payee, and understood the facts.

The defendant also offered to prove that, before he signed this draft, he had invariably been told, on presenting such drafts to the plaintiffs, that they received such drafts as cash, and that "a signer on such drafts was not to be held liable as an indorser, but only as guaranteeing the payee's signature to be genuine, and to indicate the person to whom the money was to be paid out; and that the other banks

shows that the very same sum of money paid in the one country is not an indemnity or equivalent for it, when paid in another country, to which, by the default of the debtor, the creditor is bound to resort. Suppose a man undertakes to pay another $10,000 in China, and violates his contract; and then he is sued therefor in Boston, when the money, if duly paid in China, would be worth at the very moment twenty per cent more than it is in Boston: what compensation is it to the creditor to pay him the $10,000 at the par in Boston? Indeed, I do not perceive any just foundation for the rule that interest is payable according to the law of the place where the contract is to be performed, except it be the very same, in which a like claim may be made as to the principal, viz., that the debtor undertakes to pay there, and therefore is bound to put the creditor in the same situation, as if he had punctually complied with his contract there." See Grimshaw v. Bender, 6 Mass. 157. — ED.

in Lowell were accustomed to buy drafts with the same understanding." But the court rejected the evidence.

Upon this evidence, the defendant requested the judge to instruct the jury as follows: "If the defendant had no interest or title in the bill, and put his name thereon, not for the purpose of becoming an indorser, but for the purpose of guaranteeing the identity of the payee, and of the genuineness of the signature on the back of the bill, and this was so understood by the plaintiffs at the time the defendant's name was put there, then the plaintiffs cannot recover against the defendant as indorser.

"The defendant has the right to show the manner in which his name came on the bill by parol evidence; and the jury have the right to infer what the contract was from the custom of trade, and all other evidence in the case.

"Proving the genuineness of the signature of Adeline Hall upon such bill of exchange would not support the allegation of the declaration that said Hall duly indorsed the same to the defendant, who became thereby the lawful owner thereof, if the jury find she was a married woman, with a lawful husband alive, at the time of such indorsement."

The court declined to give such instructions, but did instruct the jury as follows: "It being conceded or proved that the payee of this draft indorsed the same in blank, and that the defendant indorsed his name under the signature of Adeline Hall, the payee, without any declaration, verbal or written, restricting or limiting such indorsement, and before the same was negotiated to the plaintiffs, and that the draft was immediately afterwards negotiated to the plaintiffs, and the money taken thereon by the defendant, the defendant's liability upon such indorsement is a matter of law for the decision of the court, and the defendant is liable as indorser upon said draft."

And thereupon the court directed the jury to return a verdict for the plaintiffs, which was done, and the defendant alleged exceptions.[1]

B. F. Butler and *R. B. Caverly*, for the defendant.

D. S. Richardson, for the plaintiffs.

BIGELOW, J. We see no reason for disturbing this verdict.

1. The defendant could not control his indorsement of the draft, by parol evidence, showing that he was not to be held liable as indorser. By placing his name on the back of the draft, before it was received by the plaintiffs, he entered into a contract with the holder, in legal effect the same as if his whole liability had been written out in full over his signature. The draft was taken by the plaintiffs in due course of business, and before its dishonor. The defendant placed his name

[1] A portion of the case relating to a question of diligence has been omitted. — ED.

upon it under that of the payee. This made him an indorser, with all the incidents and liabilities of that relation, and he cannot now control them by verbal testimony.[1] Riley v. Gerrish;[2] Hoare v. Graham; Chitty, Bills (10th Am. ed.), 144.

2. Nor could he controvert the capacity of the payee to indorse the draft and pass the title to it to himself, and through him to the plaintiffs. By placing his own name as indorser on the draft, he admitted the legal ability and signature of every antecedent party.[3] Byles on Bills (6th ed.), 355; Lambert v. Pack, Critchlow v. Parry.[4]

Exceptions overruled.

[1] In Barnstable Bank v. Ballou, 119 Mass. 487, one who signed a note as ostensible surety was not permitted to show that his signature was given merely to comply with a rule of the plaintiff bank requiring a certain number of names upon all notes discounted by the bank, and with the mutual understanding that the defendant was in no event to be held liable upon the note. But in Rockhill v. Moore, 1 Pa. L. J. 392, a defendant who indorsed his name upon a note under similar circumstances was held to incur no liability. Conf. Loomis v. Fay, 24 Vt. 240, and Corcoran v. Hodges, 2 Cranch, C. C. 452.

See also Powers v. French, 1 Hun, 582; Davis v. Morgan, 64 N. Ca. 570; Morris v. Faurot, 21 Oh. St. 155; *supra*, p. 98, 99, note 1. — Ed.

[2] 9 Cush. 104.

[3] Haly v. Lane, 2 Atk. 181; Culver v. Leovy, 19 La. An. 202; Burrill v. Smith, 7 Pick. 291; Erwin v. Downs, 15 N. Y. 575; Ogden v. Blydenburgh, 1 Hilt. 182; Lloyd v. Burns, 88 N. Y. Sup'r Ct. 423, *accord*.

Although it is commonly said that an indorser impliedly warrants the genuineness of prior signatures, and the legal capacity of prior parties, the accuracy of this notion may perhaps be doubted. If the indorser's contract is a contract of warranty, it is obviously broken, if at all, at the very moment the bill is transferred, and accordingly he might be liable to an action long before the maturity of the bill, — a result which would seem directly to contravene his express contract to pay only after the dishonor of the bill. Furthermore, the existence of an express contract ordinarily excludes the possibility of an implied contract to the same effect. At all events, each indorser is a new drawer, and therefore, as between himself and his indorsee, or a subsequent holder, the previous history of the instrument is a matter of no significance whatever.

Accordingly, an indorser cannot defeat an action against himself by showing fraud or illegality in the transactions of prior parties to the bill. Edwards v. Dick, 4 B. & Al. 212; Day v. Stuart, 6 Bing. 109; McNeil v. Knott, 11 Ga. 142; Graham v. MaGuire, 39 Ga. 581; Frank v. Longstreet, 44 Ga. 178; Brown v. Wilcox, 15 Iowa, 414; Succession of Weil, 24 La. An. 139; Mabry v. Matheny, 18 Miss. 828; M'Knight v. Wheeler, 6 Hill, 492; Morford v. Davis, 28 N. Y. 481; Fake v. Smith, 2 Abb. App. 76; Dalrymple v. Hillenbrand, 62 N. Y. 5; Unger v. Boas, 13 Pa. 601; Moffett v. Bickle, 21 Grat. 280; Morrison v. Lovell, 4 W. Va. 846.

But see *contra*, Root v. Godard, 3 McL. 102; Root v. Wallace, 4 McL. 8. — Ed.

[4] 2 Camp. 182.

SAMUEL B. TUTTLE v. LAFAYETTE F. STANDISH AND TRUSTEES.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1862.

[*Reported in* 4 *Allen*, 481.]

CONTRACT against the indorser of a lost note of $500, signed by one Pritchard and given by him as a business note to the defendant, to whose order it was payable, and by whom it was indorsed to one Newell, who transferred it to the plaintiff before its maturity. At the trial in the Superior Court, before Morton, J., various questions arose which are not now material. The judge directed a verdict to be returned for the plaintiff, and reported the case for the determination of this court.

G. M. Stearns, for the plaintiff.

J. Wells, for the defendant.

HOAR, J. The principles upon which the right to recover on a lost note depend have been fully considered in a case which came before us since this case was argued. Tower *v.* Appleton Bank.[1] The general rule is that, where the writing is merely the evidence of a contract, the loss or destruction of the writing does not destroy the cause of action, but renders secondary evidence admissible. But where, from the nature of the contract, the party answerable upon it is entitled to have the writing delivered up to him, for his security, or to enable him to enforce his rights under it, when he is called upon to perform it, as in the case of a negotiable bill or note, if it is lost or destroyed, an action cannot be maintained upon it, unless his rights can be fully secured by a bond of indemnity or other sufficient security. In the case of the maker of a negotiable promissory note payable to bearer or indorsed in blank, the maker being the party ultimately chargeable, the only hazard to which he is exposed is that he may be called upon a second time to pay it to a *bona fide* holder; and against this risk a bond of indemnity seems to afford an adequate protection. The acceptor of a bill of exchange is in a similar position, except that he may want the bill as a voucher in his settlement with the drawer. But, even in these cases, the settled doctrine in England and in New York has been that the only remedy was in equity, if the note or bill was lost; their courts considering that a court of law had no authority to order an indemnity to a defendant, as a condition of the plaintiff's

[1] 3 Allen, 387.

right to recover. This doctrine has been recently modified by statutory provisions.

In the absence of general equity powers, it was early held in this commonwealth that the owner of a lost note might recover against the maker, upon giving a bond of indemnity, and that a court of law might require such a bond to be given. Jones v. Fales,[1] Fales v. Russell,[2] Almy v. Reed.[3] But all the considerations against allowing such a recovery apply more forcibly to the case where payment is demanded of an indorser; for he is entitled to the possession of the note, in order to have his recourse over against the maker. Story on Notes, § 108; and see Smith v. Rockwell.[4] And it is apparent that a mere bond of indemnity against being compelled to make a second payment is usually no sufficient substitute to the indorser for the production and delivery of the note. In pursuing his remedy over, he needs the instrument as the evidence of his own right. When he has received it from the indorsee by payment, it still retains its negotiable quality. He may wish to dispose of it to a purchaser. If he may do this by an indorsement on a copy, when the original is lost, how is he to transfer or preserve the evidence necessary to make it available? He may have occasion to transmit it for collection to distant places, and the mass of evidence to supply its place is by no means equally transmissible or equally permanent. If he sues the maker, he is not only put to additional trouble and inconvenience in establishing his claim, but is obliged in his turn to furnish a bond of indemnity. There are many cases in which it is difficult to see how a complete equivalent for all that he loses in the loss of the paper can be secured to him.

It is very evident that, if one is bound by contract to furnish a negotiable note to another, it would be no legal or equitable performance of that obligation to furnish evidence that the note has been lost or destroyed, and to assign the mere right of property in the contract of which the missing paper was the evidence.

There was no case cited at the argument in which there had been a recovery at law against an indorser on a lost note. In Jones v. Fales,[5] the action was upon several notes; and a part of them were indorsed by the defendant, and on the others he was promisor. The court in their opinion make no distinction as to his liability in these different capacities. But it is to be observed of that case: 1. That no point especting such a distinction was made or presented to the court; 2. That the notes were lost from the files of the court, so that one party was no more responsible for the loss than the other; and, 3. That the notes were found before any judgment was rendered. It is not, there-

[1] 5 Mass. 101. [2] 16 Pick. 315. [3] 10 Cush. 421.
[4] 2 Hill (N. Y.), 482. [5] 5 Mass. 101.

fore, an authority of much weight upon the question now before us. In Freeman v. Boynton,[1] it was said by Mr. Justice Parker that a demand on the maker upon a lost note would be sufficient to charge the indorser, if accompanied with a tender of sufficient indemnity, which would seem to imply that a claim upon it might be maintained against the indorser; but the point was not decided.

In Renner v. Bank of Columbia,[2] a judgment was recovered against an indorser upon a lost note; but no point was made of any distinction between his case and that of a promisor. In that case, also, it appeared that there had been a previous suit against the maker, in which the note had been used.

Considering the point an open one in this commonwealth, we do not mean to say that the reasoning of the court in Fales v. Russell is not, in many cases, as applicable to the case of an indorser as of a promisor. If, for example, the note were proved to have been made for the accommodation of the indorser, a simple bond of indemnity might be a sufficient protection to the defendant. If the holder had previously recovered a judgment against the maker, an assignment of the judgment, with such a bond, might secure his rights substantially. And these securities might, perhaps, be as well afforded in a suit at law, as a condition of the issuing of an execution, as in a suit in equity. But, with the full equity jurisdiction now existing in Massachusetts, it cannot be necessary to attempt to extend the functions of a court of law to any doubtful cases, for which equity affords a more appropriate remedy. That jurisdiction allows so much greater latitude in adapting its processes and decrees to the particular circumstances of each case, that, with its power of embracing and adjusting in one suit the rights and claims of all parties in interest, it seems to furnish the proper tribunal for the prosecution of a claim like that which we are now considering. A simple bond of indemnity would not be an adequate protection to the defendant; and it would be a novel, and, as it seems to us, an impracticable course, to attempt to devise and impose an obligation on the plaintiff to do all the affirmative and positive acts which the assertion of the defendant's rights against the maker of the note might hereafter require.

Whether even a court of equity could give relief might depend upon circumstances not fully developed.

The objection to the plaintiff's recovery not being the want of an original cause of action, nor that the cause of action has been extinguished, but that he is unable, perhaps by a misfortune only temporary, to produce the paper necessary as the foundation of a judgment, it

[1] 7 Mass. 486. [2] 9 Wheat. 581.

seems to us that he should have the election to become nonsuit, if he shall be so advised; otherwise, the verdict to be set aside and judgment entered upon the report for the defendant.[1]

URIAH M. LEE AND THOMAS MURPHY, RESPONDENTS, v. GEORGE SELLECK, APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, DECEMBER TERM, 1865.

[*Reported in* 33 *New York Reports*, 615.]

THE appeal is from an order of the Supreme Court at the general term in the second district, reversing the judgment at special term, in favor of the defendant, and granting a new trial. The case, as decided in that court, is reported in 32 Barbour, 522.

The appellant was sued in this State as indorser of a promissory

[1] Powell *v.* Roach, 6 Esp. 76 (overruling Hart *v.* King, 12 Mod. 310); Champion *v.* Terry, 3 B. & B. 295: Smith *v.* Rockwell, 2 Hill, 482 (*semble*); Wilder *v.* Seelye, 8 Barb. 408 (*semble*), *accord.*

Herndon *v.* Givens, 16 Ala. 261; Hinsdale *v.* Miles, 5 Conn. 331; Torrey *v.* Foss, 40 Me. 74; Aborn *v.* Bosworth, 1 R. I. 401, *contra.*

See Renner *v.* Bank of Columbia, 9 Wheat. 581; Abbott *v.* Striblen, 6 Iowa, 191; Smith *v.* Walker, Sm. & M. Ch. 432.

In Wilder *v.* Seelye, *supra*, the defendant pleaded a tender, made three months after the maturity of the note, of the amount then due, including interest, costs of protest, &c., and a continued readiness thereafter to pay the said amount, which he brought into court. The plaintiff denied the alleged tender. The defendant had, in fact, offered the amount due, upon the condition of having the note surrendered to him. The court, in giving judgment for the defendant, said, *per* Hand, J., p. 409: "The first and important question in this case is whether the indorser of a note, upon paying or offering to pay it to the holder, is entitled to insist upon its being delivered to him as a condition of such payment. The referees decided that the tender before suit brought, being upon such condition, was not valid. In this I think they were mistaken. It is well settled that the party liable upon a bill of exchange, or promissory note which is negotiable, may require its production and delivery, upon paying it. . . . No doubt, as a general rule, a tender must be unconditional. But negotiable paper is an exception. . . .

"It has been said that, in strictness, a plea of tender is applicable only where the party pleading it has never been guilty of any breach of contract. Lord Ellenborough, in Hume *v.* Peploe, 8 East, 168. . . . But if the rule requiring the defendant to plead that he has always been ready to pay is good law here, in some cases, I doubt whether it applies in a suit by the indorsee against the indorser. No doubt the indorser may be sued without a special request or demand upon him personally. But I think he may also plead tender after the note becomes due, especially if he has not, upon request, refused to pay it. Walker *v.* Barnes; Soward *v.* Palmer, 8 Taunt. 277." — ED

note for $3,378.75, made in August, 1857, and payable eight months after date, at George Selleck's bank, Morris, Illinois, with current exchange on New York.

The facts material to the issue, as found by the judge, are substantially these:—

The note at maturity was duly presented and protested, and due notice was given to the indorser.

At the date of the note, and ever since that time, the maker, Benjamin Selleck, was solvent, and resided at Beloit, in the State of Wisconsin. He made the note in the city of New York, and forwarded it thence for indorsement to George Selleck, who resided at Morris, Illinois. The appellant wrote his indorsement there, and transmitted the note by mail to the maker at Beloit, who mailed it to the plaintiffs at New York. They received it in that city with the appellant's indorsement thereon.

The note was given for goods sold and delivered by the plaintiffs to Benjamin Selleck, on an agreement that he would give his note with this indorsement, and the plaintiffs received it about ten days after the delivery of the goods.

By the statute of Illinois then in force, the effect of such an indorsement, if all the parties had been residents of that State, and the contract had been concluded there, would be to bring the case within the following provision, the indorser being regarded as the plaintiffs' assignor:—

"Every assignor or assignors, or his, her, or their heirs, executors, or administrators of every such note, bond, bill, or other instrument in writing, shall be liable to the action of the assignee or assignees thereof, or his, her, or their executors or administrators, if such assignee or assignees shall have used due diligence, by the institution and prosecution of a suit against the maker or makers of such assigned note, bond, bill, or other instrument of writing, or against his, her, or their heirs, executors, or administrators for the recovery of the money or property due thereon, or damage in lieu thereof; provided that, if the institution of such suit would have been unavailing, or that the maker or makers had absconded or left the State, when such assigned note, bond, bill, or other instrument in writing became due, such assignee or assignees, or his or her executors or administrators, may recover against the assignor or assignors, or against his or their heirs, executors, or administrators, as if due diligence by suit had been used."

The following were the judge's conclusions of law applicable to these facts:—

1. That the law of the State of Illinois governs the contract of indorsement of said note, and the liability of the indorser.

2. That the fact that the note was sent by the indorser by mail, to the maker in Wisconsin, and by him forwarded by mail to the plaintiffs in New York, does not make the contract of indorsement a New York or Wisconsin contract, governed by the law of either of those States, but the indorsement is governed by the laws of Illinois.

3. That the residence of the maker, Benjamin Selleck, in Wisconsin, at the time of the making and indorsement of said note, does not relieve the plaintiffs from the necessity of prosecuting the maker at law, before resorting to the indorser.

4. That the plaintiffs have not used due diligence by the institution and prosecution of a suit against Benjamin Selleck, the maker, it not appearing that the institution of such suit would have been unavailing.

5. That the plaintiffs, on the evidence, are not entitled to recover against the defendant, George Selleck, and that the said George Selleck is entitled to judgment against the plaintiffs for his costs.

To each of these conclusions the plaintiffs duly excepted.

A new trial having been granted at the general term, the appellant stipulates that, if the order be affirmed, judgment absolute shall be rendered against him.

E. L. Fancher, for the appellant.

Levi S. Chatfield, for the respondent.

PORTER, J. If the contract of the indorser was made in the city of New York, and in contemplation of its performance there, the plaintiffs were entitled to judgment. The note, though made in New York, was payable in Illinois; and its legal effect, so far as the maker was concerned, depended on the law of that State. The engagement of the indorser, though auxiliary in its character, was an independent contract; and it could only be fulfilled by direct payment to the plaintiffs, who were residents of the city of New York. The maker reserved the right to pay the note when it matured, at the bank of the appellant in Illinois. A qualified indorsement would have secured a similar right to the appellant; but as he made no such stipulation, in respect to the performance of his own conditional engagement, he was bound by the general rule of commercial law to fulfill it at the residence of the plaintiffs, unless he could find them elsewhere. Everett *v.* Vendryes.[1] His undertaking had its inception in this State as a subsisting contract. The fact that he wrote his name in Illinois is of no moment, if the engagement was consummated elsewhere. The note, with his indorsement in blank, was intrusted to his own agent for delivery to the plaintiffs in New York; and it was only on such delivery that it became operative as a mutual contract. Cook *v.* Litchfield,[2] Hyde *v.*

[1] 19 N. Y. 437. [2] 5 Seld. 280, 290.

Goodnow.[1] It is clear, therefore, that the nature and extent of his liability depend on the law of New York, and not on the statutes of Illinois.

We are also of opinion that, upon the facts found, the appellant would be liable to the plaintiffs, even under the provisions of those statutes. The liability of the assignor is fixed, without resort to a previous suit against the maker, where such a suit would be unavailing. The maker resided in Wisconsin, and the holders of the paper were not bound to pursue him into a foreign jurisdiction, as a condition precedent to recovery against the indorser in Illinois. Schuttler *v.* Piatt,[2] Olcott *v.* Tioga Railroad Company.[3]

The order of the Supreme Court should be affirmed, with judgment absolute for the plaintiffs.

All the judges concurring, *Judgment affirmed.*[4]

ISAAC BLETHEN *v.* JOHN LOVERING.

IN THE SUPREME JUDICIAL COURT, MAINE, 1870.

[*Reported in* 58 *Maine Reports*, 437.]

ASSUMPSIT to recover the amount paid by the plaintiff to the defendant for a negotiable promissory note, dated June 11, 1855, for $35, payable in one year, given by one Durnin to the defendant and by the latter indorsed, "without recourse," to the plaintiff; and for costs and expenses paid on a judgment recovered in February, 1865, against the plaintiff, by Durnin, in an action against him on the note by the plaintiff.

The writ was dated Sept. 14, 1866.

It appeared, on the part of the plaintiff, that the note mentioned was indorsed, "without recourse," to the plaintiff, by the defendant, about the time it became due, for a valuable consideration, and that it was void for want of consideration at its inception.

That the plaintiff brought a suit on the note against Durnin, who

[1] 3 Comst. 270. [2] 12 Ill. 417. [3] 20 N. Y. 210.

[4] Stanford *v.* Pruet, 27 Ga. 243; Goddin *v.* Shipley, 7 B. Mon. 575 (*semble*); Young *v.* Harris, 14 B. Mon. 556; Kinzie *v.* Farmers' Bank, 2 Doug. (Mich.) 105; Friese *v.* Brownell, 35 N. J. 285 (*semble*); Cook *v.* Litchfield, 5 Seld. 279; 5 Sandf. 330, s. c., *accord*.

Greathead *v.* Walton, 40 Conn. 226, *contra*.

Where a bill purported to be drawn in one jurisdiction, but was in fact drawn in another jurisdiction, the nature of the drawer's liability was held in Strawbridge *v.* Robinson, 10 Ill. 470, to depend upon the law of the place where it was dated. But see Blodgett *v.* Durgin, 32 Vt. 361, *contra*. — ED.

recovered judgment against the plaintiff upon the ground that the note was void for want of consideration, and that that suit cost him one hundred dollars.

The action was withdrawn from the jury, and reported to the full court; and, if the action was not maintainable, the plaintiff was to become nonsuit.

Henry Hudson, for the plaintiff.

The suit was commenced within six years from the time of the verdict in the suit on the note, when this cause of action accrued and the statute began to run. Gilmore *v.* Bussey,[1] Butler *v.* Horne,[2] Cole *v.* McGlathry,[3] McKnown *v.* Whitmore.[4]

The fraud was concealed, and the suit was commenced within six years after the cause of action was known. R. S. of 1857, c. 81, § 107; Bishop *v.* Little,[5] Rouse *v.* Southard.[6]

A. M. Robinson, for the defendant.

APPLETON, C. J. The defendant, on or about its maturity, indorsed to the plaintiff, "without recourse," a note signed by one Charles Durnin, for $35, dated June 11, 1855, and payable in one year. On the note, the plaintiff brought a suit, which was referred; and the referee made a report in favor of said Durnin, which was accepted at the February term, 1865, of this court, for Aroostook County, and judgment rendered thereon.

On the 14th September, 1866, the plaintiffs brought this action on the ground of an implied promise or warranty, on the part of the defendant, at the time of the transfer, that the amount purporting to be due was due, when, in truth, nothing was due, the note having been given without consideration.

If the note was without consideration, the plaintiff claims that the defendant, notwithstanding his special indorsement, would be liable within the principle of the Ticonic Bank *v.* Smiley.[7] If it be so, his liability, whatever it was, accrued at the time of his indorsement, and not since. If there was a promise or a warranty, it was according to the statement of facts, broken as soon as made. So an indorsement of a negotiable paper is a warranty, by him who makes it, to every subsequent holder in good faith, that the instrument itself and all the signatures antecedent to such indorsement are genuine; and, where the signatures are forgeries, the indorser is at once liable upon his warranty to such subsequent holder, without any presentment for payment or notice of non-payment. Turnbull *v.* Boyer.[8] The liability

[1] 12 Maine, 418. [2] 13 Maine, 397. [3] 9 Maine, 131.
[4] 31 Maine, 448. [5] 3 Greenl. 405. [6] 39 Maine, 404.
[7] 27 Maine, 225. [8] 40 N. Y. 456.

of the defendant accruing, then, at the time of his indorsement, the statute of limitation constitutes a bar.

The plaintiff seeks to avoid this by R. S., c. 81, § 107, which extends the limitation in cases of fraudulent concealment of the cause of action. But neither the writ nor the report of the evidence sets forth any such fact or any offer to prove such fact.

Plaintiff nonsuit.[1]

[1] Watson v. Chesire, 18 Iowa, 202; Ticonic Bank v. Smiley, 27 Me. 225; Dumont v. Williamson, 18 Ohio St. 515; Beckwith v. Farnum, 5 R. I. 230, *accord*.

An indorsement "without recourse," being in legal effect a sale, the indorser, like the vendor of any other chattel, impliedly warrants the title and the genuineness of the thing he purports to sell.

The same principle applies, of course, where negotiable paper is transferred by delivery merely. Accordingly, the transferee may, if any signature to the instrument proves to be a forgery, recover his money in an action of assumpsit for money had and received. Jones v. Ryde, 5 Taunt. 488; Bruce v. Bruce, 1 Marsh. 165; Fuller v. Smith, Ry. & M. 49; Gompertz v. Bartlett, 2 E. & B. 849; Gurney v. Womersley, 4 E. & B. 133; Terry v. Bissell, 26 Conn. 23; Wilson v. Alexander, 4 Ill. 392; Glass v. Read, 2 Dana, 168 (*semble*); Mudd v. Reeves, 2 Har. & J. 368; Buck v. Doyle, 4 Gill, 478; Merriam v. Wolcott, 3 All. 258; Thompson v. McCullough, 31 Mo. 224; Johnson v. Titus, 2 Hill, 606 (*semble*); Morrison v. Currie, 4 Duer, 79; Ledwich v. McKim, 53 N. Y. 307; Hargrave v. Dusenberry, 2 Hawks, 326; Ritchie v. Summers, 3 Yeates, 531; Ramsdale v. Horton, 3 Barr, 330; Aldrich v. Jackson, 5 R. I. 218; Chalmers v. Harris, 22 Tex. 265; Lyons v. Miller, 6 Grat. 427. Or he may maintain special assumpsit upon the implied warranty. Snyder v. Reno, 38 Iowa, 329; Lobdell v. Baker, 1 Met. 193; Coolidge v. Brigham, 1 Met. 547; 5 Met. 68, s. c.; Cabot Bank v. Morton, 4 Gray, 156; Delaware Bank v. Jarvis, 20 N. Y. 226; Whitney v. National Bank, 45 N.Y. 303; Bell v. Dagg, 60 N.Y. 528; Aldrich v. Jackson, 5 R. I. 218; Strange v. Ellison, 2 Bail. 385; Thrall v. Newell, 19 Vt. 202 (*semble*); Allen v. Clark, 49 Vt. 390 (*semble*); Giffert v. West, 37 Wis. 115. See to the same effect Shaver v. Ehle, 16 Johns. 201 (*semble*); Murray v. Judah, 6 Cow. 484; Swanzey v. Parker, 50 Pa. 441; Barton v. Trent, 3 Head, 167, where the transferrer was held to be an incompetent witness because of his contingent liability on an implied warranty.

In Baxter v. Duren, 29 Me. 484; Ellis v. Wild, 6 Mass. 321 (*semble*, but *overruled*); Rieman v. Fisher, 12 Md. 497, the existence of an implied warranty was denied.

Conf. *Ex parte* Bird, 4 De G. & Sm. 273; Pooley v. Brown, 11 C. B. N. S. 566; Ketchum v. Stevens, 19 N. Y. 499. — Ed.

It has been held that an indorser without recourse, or transferrer by delivery, warrants that the bill is free from any real defence, *e. g.*, statutory invalidity: Challis v. McCrum, 19 Alb. L. J. 512 (Kas. 1879) (usury); Hannum v. Richardson, 48 Vt. 508 (intoxicating liquors); Giffert v. West, 33 Wis. 617 (usury); or personal incapacity; Lobdell v. Baker, 1 Met. 193 (*semble*) (infancy); Baldwin v. Van Deusen, 37 N. Y. 487; Thrall v. Newell, 19 Vt. 202 (*semble*). And a transferrer after maturity warrants against personal defences, *e. g.*, payment; Watson v. Chesire, 18 Iowa, 202; Knight v. Lanfear, 7 Rob. (La.) 172; Michel v. Valentine, 10 Rob. (La.) 404; Ticonic Bank v. Smiley, 27 Me. 225; Frazer v. D'Invilliers, 2 Barr. 200. But this doctrine was denied in Littauer v. Goldman, 72 N. Y. 506 (usury); Otis v. Cullum, 92 U. S. 447 (approved in Town of Orleans v. Platt, 7 Reporter, 737.)

ROSS v. ESPY.

IN THE SUPREME COURT, PENNSYLVANIA, NOVEMBER 9, 1870.

[*Reported in* 66 *Pennsylvania Reports*, 481.]

THIS was a feigned issue, in which Joseph Ross was plaintiff, and William Espy was defendant, directed at January term, 1866, under the following circumstances: —

On the 12th of April, 1861, John Smithley drew a note for his own accommodation for $400, payable to the plaintiff at four months: the note was indorsed by the plaintiff, and then by the defendant. It was discounted at a Pittsburg bank, was unpaid at maturity, and protested: the bank recovered separate judgments for the amount of the note against each indorser. The defendant paid the amount recovered by the bank, and took an assignment of the judgment against Ross, who paid one-half the amount into court, alleging that although he was the payee and first indorser, yet at the time of the transaction it was agreed between the indorsers and Smithley that they would both indorse for his accommodation, and, in case of his failure to pay, they would be jointly liable. The issue was on a wager in the usual form to try whether the plaintiff was liable for the remaining half of the note.

The plaintiff called Smithley, who was objected to by the defendant as incompetent. He was admitted by the court, "reserving the right to exclude the testimony."

He testified that at the time the note was drawn he asked the defendant to indorse: he said he would, if the plaintiff would; plaintiff and defendant and witness met together, when plaintiff and defendant agreed that, if it should not be paid by witness, they would "divide the loss equally." The note was for the benefit of the witness: the agreement was not in writing, but was made at the time of the indorsement.

The case was tried March 15th, 1869.

The court (Kirkpatrick, J.) directed the jury to find for the defendant.

The plaintiff removed the case to the Supreme Court, and assigned the charge for error.

R. & S. Woods, for plaintiff in error.

N. P. & C. S. Fetterman, for defendant in error. Smithley was not competent. Saurman v. Bodey,[1] Pierce v. Butler.[2] The undertaking testified to by Smithley was to pay the debt of another, and should have been in writing. Act of April 26th, 1855, § 1, Pamph. L.

[1] 6 Wright, 476. [2] 14 Mass. 303-312; 1 Green. Ev. § 401.

308; Purd. 497, pl. 4. It could be proved only by a writing. Miller v. Fichthorn,[1] Jack v. Morrison.[2]

The opinion of the court was delivered January 3d, 1871, by

AGNEW, J. A note was drawn by Smithley, to order of Ross, and by him indorsed; then indorsed by Espy, and discounted at the Iron City Bank. Payment failing, the bank got separate judgments against the indorsers, Ross and Espy. Espy paid the bank, and claimed the right to control the judgment against Ross. Ross alleged an agreement at the time the note was drawn and indorsed (all the parties being together) that he and Espy should indorse for the accommodation of Smithley, and, in the event of his failure to pay, that he and Espy should contribute equally. This was a feigned issue to try the fact as to contribution. Smithley was offered as a witness, and objected to as a party to the note and incompetent, the trial being on the 15th of March, 1869, and was received by the court, subject to the right to exclude his testimony afterwards, and no exception taken by the defendant to his admission. The trial being a month before the Act of 15th April, 1869, making interest and policy of law no longer a ground of incompetency, Smithley was then incompetent. Saurman's Ex'rs v. Bodey,[3] Barton v. Fetherolf.[4] But the judge who tried the cause gave no instruction to the jury to exclude the testimony of Smithley, and charged them peremptorily, "as a matter of law, that under all the evidence in the case the plaintiff cannot recover, and their verdict must be for the defendant." Whether the learned judge had in his mind the whole evidence, excluding the testimony of Smithley (which is quite possible), we cannot tell from the charge sent up to us. But the evidence having been received without exception, in order to reserve the question, it was the duty of the court to have charged expressly on the competency of the witness, if they believed him incompetent, in order that the plaintiff might have the benefit of an exception, if he conceived himself aggrieved by the decision. As the evidence stood before the jury, the agreement proved by Smithley was a flat bar to Espy's right to recover more than the one-half of the money he advanced in payment of the note. Whatever objection there might have existed to the competency of the channel through which the evidence came, the evidence itself was entirely competent. The contract of indorsement is one implied by the law from the blank indorsement, and can be qualified by express proof of a different agreement between the parties, and is not subject to the rule which excludes the proof to alter or vary the terms of an express agreement. This is well settled. Susquehanna Bridge and

[1] 7 Casey, 252.
[2] 12 Wright, 113.
[3] 6 Wright, 476.
[4] 8 Wright, 279.

Bank Co. *v.* Evans,[1] Barclay *v.* Weaver.[2] The very point now before us was decided in Hill *v.* Ely [3] and Patterson *v.* Todd,[4] and analogous decisions will be found in Bank *v.* Fordyce [5] and Miller *v.* Henderson.[6] The agreement to contribute equally between the indorsers modified the implied contract of Ross by his indorsement to pay Espy; and, being made at the very time when they both indorsed for the accommodation of Smithley, the court ought so to have informed the jury, unless they had previously excluded the testimony of Smithley.

Judgment reversed, and a venire facias de novo awarded.

Ex parte HEIDELBACK. — *In re* GLYN.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF MASSACHUSETTS, DECEMBER, 1876.

[*Reported in* 2 *Lowell*, 526.]

DAMAGES ON BILLS OF EXCHANGE. The amount of debt which the holders of certain bills of exchange should prove against the estate of the bankrupt was submitted to the court upon agreed facts.

Heidelback, Frank, & Co., of New York, hold two similar bills, of one of which the following is a copy: —

"£2,500. BOSTON, May 6, 1875.

"Sixty days after sight of this first of exchange (second and third unpaid), pay to the order of myself twenty-five hundred pounds sterling, value received, and charge the same to account.

"CHARLES H. GLYN.

"To Messrs. Robert Benson & Co., London.

(*Indorsed.*)

"Pay to Heidelback, Frank, & Co., or order. Value received.

"New York, May 7, 1875. CHARLES H. GLYN.

"Accepted May 18, 1875, at Messrs. Glyn, Mills, & Co.

"ROBERT BENSON & Co."

[1] 4 Wash. C. C. R. 480. [2] 7 Harris, 396. [3] 5 S. & R. 368.
[4] 6 Harris, 426. [5] 9 Barr, 276. [6] 10 S. & R. 290.

[7] Sherrod *v.* Rhodes, 5 Ala. 688 (*semble*); Rhodes *v.* Sherrod, 9 Ala. 63; Denton *v.* Lytle, 4 Bush, 597; Love *v.* Wall, 1 Hawks, 813; Daniel *v.* McRae, 2 Hawks, 590; Easterly *v.* Barber, 66 N. Y. 433; Kelly *v.* Few, 18 Oh. 441, *accord*.

The same principle was applied in Phillips *v.* Preston, 5 How. 278; Edelen *v.* White, 6 Bush, 408; Smith *v.* Morrill, 54 Me. 48; Weston *v.* Chamberlin, 7 Cush. 404; Clapp *v.* Rice, 13 Gray, 403, 406 (*semble*); Dunn *v.* Wade, 28 Mo. 207, in which cases a prior indorser was permitted to recover contribution of a subsequent indorser, upon proof of a verbal agreement that they should be jointly liable for the payment of the bill or note. See Morrison *v.* Smith, 13 Mo. 284. — ED.

The other holders have bills like this, excepting that the indorsement of Glyn is thus: "Pay A. B. or order. Charles H. Glyn."

The question presented is whether the interest and damages are to be assessed according to the law of New York or that of Massachusetts.

At the time the bills were drawn, Glyn had an office and did business in Boston, and these bills were written and indorsed in blank by Glyn in Boston, and were by him sent to his agent in New York, who negotiated them to Heidelback, Frank, & Co., and received the amount of the same, and remitted the same to Glyn.

Heidelback, Frank, & Co. forwarded the bills to London for acceptance, where they were accepted, and subsequently duly protested for non-payment, and returned to Heidelback, Frank, & Co.

The words, "Pay to Heidelback, Frank, & Co., or order, value received, New York, May 7, 1875," were written in New York over Glyn's indorsement at the time of the negotiation of the bills. The bills held by the other petitioners were drawn, indorsed, and negotiated in like manner.

The Revised Statutes of New York, part 2, ch. 4, p. 18, provides as follows: —

"The rate of damages to be allowed and paid upon the usual protest for non-payment of bills of exchange drawn or negotiated within this State shall, in the following cases, be as follows: —

"(4.) If such bill shall be drawn upon any person or persons, at any port or place in Europe, ten dollars upon the hundred, upon the principal sum specified in the bill."

The General Statutes of Massachusetts provide as follows: —

"When a bill of exchange, drawn or indorsed within this State, and payable without the limits of the United States, is duly protested for non-acceptance or non-payment, the party liable for the contents of such bill shall, on due notice and demand thereof, pay the same at the current rate of exchange at the time of the demand, and damages at the rate of five per cent upon the contents thereof, together with interest on the contents, to be computed from the day of the protest. And said amount of contents, damages, and interest shall be in full of all damages, charges, and expenses. Gen. Sts. ch. 58, § 11.

A. S. Wheeler & C. Demond, for the holders of the bills.

1. A bill or note takes effect as a contract, not at the place where it is written, drawn, or indorsed, but where it is delivered. Cook *v.* Moffatt,[1] Freese *v.* Brownell.[2]

2. The damages to be paid by the drawee depend upon the law of

[1] 5 How. 295. [2] 35 N. J. 285.

the place of drawing; that is (if we apply the law above mentioned in our first point), the place of delivery and negotiation. Allen *v.* Kemble,[1] Gibbs *v.* Fremont, City Savings Bank *v.* Bidwell,[2] Pine *v.* Smith,[3] Tilden *v.* Blair, Young *v.* Harris,[4] Depau *v.* Humphreys,[5] Nat. Bank *v.* Morris,[6] Bank of Georgia *v.* Lewin,[7] Sylvester *v.* Swan,[8] Whitten *v.* Hayden; Wharton, Confl. Laws, § 503.

R. R. Bishop & W. S. Hall, for the general creditors.

1. The contract of Glyn was that, if the acceptors did not pay the bills at maturity, he would, on due notice, pay the holder the sum which the acceptors ought to have paid, together with damages, which, in the absence of statute regulation, would be the expense which the holder would incur to indemnify himself at the place of payment with interest. Suse *v.* Pomp.

2. The statutes which New York and Massachusetts have made on this subject have no extra-territorial operation, and affect the remedy only. Ayer *v.* Tilden,[9] Ives *v.* Farmers' Bank,[10] Gale *v.* Eastman.[11]

3. The courts of the United States sitting in Massachusetts will follow the law of that State in the matter of damages. Rev. Sts. § 721; Brown *v.* Van Braam,[12] Haussknecht *v.* Claypool.[13]

4. If not a matter of remedy, still Boston was the place of the contract of Glyn. Snaith *v.* Mingay,[14] Barker *v.* Sterne, Lennig *v.* Ralston.

LOWELL, J. The principles of law upon which this case must be decided have been thus laid down by the Supreme Court in Scudder *v.* Union National Bank.[15] Matters pertaining to the execution, validity, and interpretation of a contract are determined by the law of the place where it is made; those connected with its performance, by the law of the place of performance; those respecting the remedy, by the *lex fori*. The distinction between the law applicable to the validity and that governing the performance was first clearly announced in this country, I believe, in the very able opinion of the court in Depau *v.* Humphreys,[5] in which a loan made and bill of exchange given in Louisiana, with a reservation of interest lawful there, but usurious in New York, was held to be valid, though the payment was to be in New York. This decision is criticised by Judge Story, who inclines to refer all contracts, even as to their validity, to the place of performance. (Confl. Law, § 304.) Judge Curtis, in arguing the important

[1] 6 Moore, P. C. 314. [2] 29 Barb. 325. [3] 11 Gray, 38.
[4] 14 B. Mon. 556. [5] 20 Martin (La.), 1. [6] 8 Sup. Ct. (1 Hun) 680
[7] 45 Barb. 340. [8] 5 Allen, 134. [9] 15 Gray, 178.
[10] 2 Allen, 286. [11] 7 Met. 14. [12] 8 Dallas, 344.
[13] 1 Black, 481. [14] 1 M. & S. 87. [15] 91 U. S. 1 Otto, 406

case of Carnegie *v.* Morrison,[1] assailed the same case, and maintained the doctrine of Story; but the court decided that the contract, which was a letter of credit issued in Boston, authorizing bills of exchange to be drawn at Gottenburg in Sweden on London, was to be governed as to its validity and effect between the original parties by the law of Massachusetts, though the bills drawn under it must conform to the law of Sweden, and the acceptance of the bills to the law of England, which is precisely the doctrine of Depau *v.* Humphreys and Scudder *v.* Union Bank, above cited.

Mr. Wharton, in his valuable work on the Conflict of Laws, § 401, proposes, as a rule which best harmonizes the authorities, one substantially like that of the decisions above referred to, though carrying the division one step farther: "Obligations, in respect to the mode of their solemnization, are subject to the rule, *locus regit actum;* in respect to their interpretation, to the *lex loci contractus;* in respect to the mode of performance, to the law of the place of performance. But the *lex fori* determines when and how such laws, when foreign, are to be adopted, and in all cases not specified above supplies the applicatory law."

In the case of a bill of exchange, the contracts of the various parties are distinct; and the drawer is bound, generally speaking, according to the law of the place where the bill is drawn, which is in most cases the same as that in which it is to be paid by him, if he pays it. Still, he is to a certain extent involved in the same law with the acceptor, because, upon due protest, demand, and notice, he is bound to make good to the holder what the acceptor ought to have paid at the place where he should have paid; which makes it necessary to ascertain what that amount was by the law of that place, and whether, by the same law, due demand was made of the acceptor, and due protest upon the dishonor. What the drawer should pay as interest, *ex mora*, or as damages, does not depend upon the law of the place where the acceptor was to pay the bill, if that is different from the place where the drawer's contract is to be performed.

So far the parties to this petition are agreed, and I have therefore cited no authorities for some of my positions; but here they divide. The general creditors contend that the law of Massachusetts governs this matter of damages in the present instance, because the remedy is sought here; and, if that be not so, because Boston is the place of performance.

The petitioners maintain that the law of New York is to be followed, because the bills were negotiated there and the first holder lived there.

[1] 2 Met. 381.

I am of opinion that the Massachusetts law governs, not because the damages are part of the remedy, which they are not, but because Boston was the place in which the drawer undertook to perform his contract.

In Massachusetts, it is held that the rate of interest to be recovered, *ex mora*, for default in paying a promissory note, is a mere matter of remedy. The decisions which establish this point, if applicable to bills of exchange, are not binding on this court, because the law of bills of exchange is part of general commercial jurisprudence, and not of local law or usage. Swift *v.* Tyson, Watson *v.* Tarpley;[1] and so is any question of the conflict of laws. When we have ascertained what local law applies to the case, we follow it; but the ascertainment itself is not a local question.

In most cases, the place where a note is made or a bill is drawn, indorsed, or accepted, is, in fact, the place where the parties respectively undertake to pay it; and therefore questions rarely come up of any distinction between the law of the contract and that of the performance; and the courts, in pronouncing on such cases, have had no such distinction in mind, and any general statements as to the contract being governed by the law of the place where it is made or is to be performed must be taken with that allowance. When they say that a bill is to be paid by the acceptor at the place where he accepts, and by the drawer where he draws, they are stating the general presumption of fact, that a bill or note is probably dated at the place where the party intends to pay it. The petitioners do not deny that it is the place of performance whose law must govern the decision of this controversy, if that is a different place from the place of entering into the contract; but they insist that unless the contract provides expressly for a different place, that of making the contract is conclusively and always the place of performance, and that a contract is made where it is delivered.

My opinion is that, where no place of performance is mentioned in a note or bill, it is to be paid by each person liable upon it, at the place of his own domicile, using that word in a sense large enough to include an established place of business as well as one of residence. Mr. Justice Story (Confl. of Laws, § 293 *c*, note 3), says that, if a note is made in one State and negotiated to an indorsee in another, the contract of the maker with the indorsee takes effect as a promise in the State where the note was made, and not where it was indorsed. It will be recollected that Judge Story refers all contracts to the place of performance, and therefore his meaning here is that the maker of a note is to pay it at his own home. So Westlake (§ 235) affirms that the acceptor promises to pay the bill, if no place of payment is named.

[1] 18 How. 517.

at the known place of business from which he dates his acceptance. And Wharton (§ 451) says that, if an indorser indorses a note when casually absent from his domicile, it is the law of such domicile that binds, that being construed to be the place, so far as he is concerned, of payment. The eminent jurist, Savigny, as quoted by Mr. Wharton (§ 426), gives several rules of law on this subject, of which two are pertinent to this case. One is, that the seat of a continuous business supplies its local law to all obligations emanating from him who conducts the business; and the other, that the debtor's domicile supplies the law to his obligations emanating from the domicile.

Those remarks agree with the general opinion of business men, as I suppose. I take it that, if a banker issues bills or notes to circulate as money, there is no doubt that his undertaking is to pay them over his counter. I take it that this bill would be called a Boston bill on London, and that all merchants would understand that the drawer's undertaking is to pay in Boston, if the drawee shall not do so in London, and he is duly notified thereof in Boston. Boston bills on London are bought in large quantities by merchants in New York, sometimes in Boston by agents of the buyers, and sometimes in New York from agents of the sellers; and sometimes, I dare say, on the cars between the two places. Now, it seems to me inadmissible to say that the same apparent contract between the same parties may have three different modes of performance, according as it is delivered in one place or another. It is true that all contracts take effect from delivery; but the question in every case is, What does the contract mean after it has been delivered? And I am of opinion that a banker's draft, dated at his usual and only place of business, is payable there on the default of the drawee, by the implied terms of the contract itself, and by the usage of merchants, and by law.

Let us now look at some of the decisions. It is well settled that, in order to hold the indorser of a note not by its terms payable at any place, demand must be made upon the maker at his domicile; that the date of the note is presumptive evidence of the domicile; and in Massachusetts, at least, the date proves the domicile for the purposes of demand and notice, unless the holder knows of some other. But, if no holder knows the real domicile, payment must be demanded there. If the promisor has changed his domicile after the note is made, the holder is not obliged to follow him beyond the jurisdiction; but, if his new domicile is within the same jurisdiction, he must demand payment there. Fisher *v.* Evans,[1] Stewart *v.* Eden,[2] *per* Livingston, J., explained in Anderson *v.* Drake,[3] Woodworth *v.* Bank of America,[4]

[1] 5 Binney, 541.
[2] 2 Caines, 127.
[3] 14 Johns. 114.
[4] 19 Johns. 391.

McGruder *v.* Bank of Washington,[1] Reid *v.* Morrison,[2] Taylor *v.* Snyder,[3] Smith *v.* Philbrick,[4] Bank of Orleans *v.* Whittemore,[5] Pierce *v.* Whitney.[6]

The meaning of these rules is that the contract of the maker of a note is to pay it at his domicile, no matter where he makes or negotiates it; that, the domicile being usually the same as the date, he may be held to the latter as his domicile, if he has not notified the taker or holder of his note to the contrary; that the domicile, so far as jurisdiction is concerned, is that which he had when the debt was contracted, and his contract is not to vary with every removal which he may make. Many of the cases turn on due diligence; but diligence in what? In demanding payment of the note at the place where the maker of it is bound, and is presumed to be ready, to pay it; that is to say, the place of performance. The decisive proof of this is that, if a place is agreed on for the performance, no demand need be made elsewhere; so that actual diligence and actual demand are not the important things, but a compliance with the law which requires demand to be made at the place of performance.

Coming now to decisions of particular cases more or less like that at bar, the first which I shall cite is a leading Scotch decision, which is given at large by two learned writers on the Conflict of Laws, — Sir R. Phillimore, vol. iv. p. 612 (1st ed.), and Mr. Wharton, § 452. In that case, a Scotchman residing in Edinburgh made a note payable to a banker, named and described as manager of the British & Australian Bank, 55 Moorgate Street, London. This was held to be a Scotch debt: nothing was proved about the place of delivery or of negotiation, from which we may infer that they were not considered important.

In Hicks *v.* Brown,[7] A. drew at New Orleans a bill on B., in Pennsylvania, in favor of C. in Tennessee, and it was held that the law of the drawer's contract was that of Louisiana. That is precisely this case, the bill taking effect when it reached the hands of the person who had given consideration for it in a State other than that in which it was drawn.

In Pine *v.* Smith,[8] a citizen of Massachusetts negotiated in New York for a loan from a citizen of that State, at eight per cent interest, which would make the contract void for usury in New York, and this was secured by note with a mortgage of land in Massachusetts. Held, a Massachusetts contract; not, however, by reason of the mortgage, which is not once mentioned in the opinion of the court.

[1] 9 Wheat. 598.
[2] 2 Watts & S. 401.
[3] 3 Denio, 145.
[4] 10 Gray, 252.
[5] 12 Gray, 469.
[6] 22 Me. 110; 29 Me. 188.
[7] 12 Johns. 142.
[8] 11 Gray, 38.

The case of Grimshaw *v.* Bender[1] goes much beyond the present. There a bill was drawn in England upon a firm whose domicile was in Boston, but the bill was payable in London, and was accepted in England by a member of the Boston house who happened to be there. The bill not having been paid was sued against the acceptors in Boston, and the court held that the measure of damages was regulated by the law of Massachusetts, because that was the domicile of the acceptors. That case is not considered sound by Judge Story. (Confl. Laws, § 419.) Mr. Wharton cites both the case and the criticism, without giving his own opinion. (Confl. Laws, § 450.) The bill was expressly made payable in London, and of course the acceptors should pay in Boston what would have produced that sum in London, which, in the absence of statute or local usage, is exactly what a drawer in Boston would be obliged to pay: therefore, the substance of the decision is sound; but in making the acceptors technically drawers in Boston, and liable to damages as such, the court overlooked the circumstance that they were not the drawers, but stood as London acceptors casually sued in Boston. After this allowance is made, the case remains a high authority for holding the domicile to be the place of performance when none other is appointed by the contract itself.

It has been twice held in England that a bill drawn abroad and filled up and negotiated in England is valid, if sufficiently stamped according to the law of the place of apparent drawing, though not sufficiently by the law of England. Snaith *v.* Mingay,[2] Baker *v.* Sterne. These decisions have been supposed to depend upon an estoppel, worked by the negotiation of the bills to innocent holders, but this explanation is not sound: they are put by the judgments upon the plain and simple reason that the contract of the drawer was made abroad; and not only so, but estoppel does not avail against the stamp laws of England. Steadman *v.* Duhamel.[3]

In Pennsylvania, too, it was decided that the drawer of a bill signed by him in blank as to amount, &c., in that State, though filled up and passed in England, must pay damages according to the law of Pennsylvania, at the date of the drawing; and this though the rate of damages had been diminished by a statute passed before the bill was actually negotiated. Lennig *v.* Ralston. In Campbell *v.* Nichols,[4] the precise distinction is taken that the validity of an acceptor's contract depends upon the law of the place where the bill is negotiated, and first becomes a contract; but that in all matters concerning the interest to be paid by him, upon that of the place where he undertook to pay. In a later case, cited by the petitioners here, the same court,

[1] 6 Mass. 319.
[2] 1 M. & S. 87.
[3] 1 C. B. 888.
[4] 4 Vroom, 81.

citing Campbell *v.* Nichols, say, though they do not decide, that a drawer's contract may differ from an acceptor's in this respect, Freese *v.* Brownell;[1] but there is neither reason nor authority for any distinction: each is liable to make good his promise when and where he undertook to make it good, as I have already shown; and if that means at the acceptor's domicile, for his part, it means at the drawer's, for his.

In Van Zant *v.* Arnold,[2] the maker and the indorser of a note both lived in Georgia; but they made and indorsed it in Tennessee, where it took effect as a contract by being delivered to an agent of a creditor of the maker, who lived in New York. It was held to be a contract governed by the law of Georgia as against the indorser, because he was domiciled there.

Many cases are cited by the petitioners to prove that the *lex loci contractus* is where the bill or note is actually negotiated. I have assumed that to be the general rule, though, if it were needful, I could point out many exceptions to it. It is not necessary, because every case but one which touches that point turns upon the validity, and not upon the mode of performance, of the contract, nor upon the damages for a breach. Thus, in Tilden *v.* Blair, a bill for five thousand dollars was drawn in Illinois and accepted in New York, and then sent back to Illinois, where it was indorsed and negotiated at a rate of interest which would be usurious in New York and avoid the contract. The acceptor was sued in the Circuit Court of the United States sitting in New York, and the court held that the validity of the acceptance depended on the place of negotiation. That court having given judgment for the plaintiff for an amount which it considered the law of Illinois made the contract available for in its inception, the Supreme Court said that the bill was good for its face, and that the only error was in not giving judgment for the whole five thousand dollars, and interest. They did not say whether the interest should be reckoned at the legal rate in Illinois, or at that prevailing in New York; nor could they, because the plaintiff had acquiesced in the ruling below. The only point in this case, therefore, is not reached by that decision. All the other cases cited are open to a similar remark, excepting Cook *v.* Moffat,[3] which is said to be decisive of this question in favor of the petitioners. I do not so understand it. The case was that A. in New York sold goods there to B., of Baltimore, who gave his note for the price, and afterwards took the benefit of the Insolvent Law of Maryland. The court held that the discharge in Maryland did not release the debt due to A. Mr. Justice Grier, in delivering the opinion of the

[1] 6 Vroom 285 [2] 31 Ga. 210. [3] 5 How. 295.

court, says that the notes being delivered in New York in payment of goods purchased there were of course payable there, and governed by the laws of that place, citing Boyle *v.* Zacharie;[1] Story, Confl. § 287. The case cited decides that advances made by a factor are to be reimbursed to him at the place where he makes them; and Judge Story, at the place cited, repeats the same doctrine. I cannot suppose that Mr. Justice Grier intended to overrule all the cases and opinions which I have cited above. There is, undoubtedly, much authority for the proposition that the whole contract of sale of goods, including the payment, is governed by the law of the place of sale; that is to say, the buyer is to seek out and pay the seller, if the goods are sold on credit, and, if for cash, he must pay him on the spot. By the law both of New York and of Maryland, the note given for the price of goods is merely security for the payment, and, if the note is ready to be surrendered in court, an action for the price of the goods may be maintained. If, therefore, an action for goods sold would not be barred by a discharge in Maryland, because its performance was to be in New York, the security ought not to be destroyed thereby. This is what I understand Mr. Justice Grier to mean in the brief remarks above quoted, though he speaks in the popular way of the note being given in payment for the goods. There are likewise, I believe, decisions that an ordinary loan is to be reimbursed where it is made, at least if no note or bill is given for it, though the cases on this point are perhaps not reconcilable with each other.

This transaction was not a sale of goods, nor a loan of money, but the transfer of a credit. The undertaking of Glyn appears to me to be that, if Benson & Co. should not accept or should not pay in London, and due demand and protest are made there, he will pay in Boston on due notice and demand here. If New York were the place of payment, a constructive demand on Glyn there would be enough to charge him as drawer or indorser; but I have seen no cases to that effect, excepting that there are a few which hold that the date is conclusive and controls every thing; and, if these should be followed, the demand and notice to Glyn as indorser might be made in New York, in respect to the two drafts in which, by his authority, the indorsements were dated there; but the better opinion is, as shown by the authorities which I have cited, that if the date and domicile differ to the knowledge of the party taking the paper, he must go to the domicile to demand payment, and so of the holder at the date of the dishonor. Glyn was not bound to tender payment in New York. If New York were the place of performance, a second or other later holder would have no information from the bill itself what the con-

[1] 6 Pet. 635.

tract of the drawer was in respect by performance, or when, where, and how he should demand it of him, excepting in respect to the two bills above mentioned, which are on their face indorsed in New York, which in this particular case might notify him, but would not have that effect, if the bills had in fact been delivered elsewhere. There is sound reason as well as strongly preponderating authority for the rule that, where the domicile and date coincide, it fixes the place of performance, if none other is mentioned in the bill. This course of reasoning shows that Glyn's indorsing two of the bills in New York, if he is to be held to have done so, is immaterial, the place of performance being indicated by the face of the bill.

The amount to be proved is the face of the bills, with exchange, interest, and damages as provided by the law of Massachusetts.[1]

[1] In addition to the cases given in this chapter, reference may not improperly be made to the following cases arising upon bills and notes, and illustrating certain doctrines of the Conflict of Laws applicable to contracts generally, *e. g.* The validity of a bill or note depends upon the *lex loci celebrati contractus*. See Burrows *v.* Jemino, 2 Stra. 733; Moore *v.* Clopton, 22 Ark. 125; Mason *v.* Dousay, 35 Ill. 424; Ford *v.* Buckeye Co, 6 Bush, 133; Carnegie *v.* Morrison, 2 Met. 381; Stevenson *v.* Payne, 109 Mass. 378; Murphy *v.* Collins, 121 Mass. 6; Thompson *v.* Ketcham, 8 Johns. 189; Touro *v.* Cassin, 1 N. & McC. 173; Palmer *v.* Yarriston, 1 Oh. St. 253, in which cases the instrument was made and payable in the same place.

It has been frequently stated that the courts of one country will pay no regard to the revenue laws of another country, and cases arising under such laws have been supposed to form an exception to the general rule above stated. James *v.* Catherwood, 3 Dow. & Ry. 190; Wynne *v.* Jackson, 2 Russ. 351; Stewart *v.* Gelot (Court of Session), July 19, 1871; Ludlow *v.* Van Rensselaer, 1 Johns. 94; Skinner *v.* Tinker, 34 Barb. 333. But there is, in fact, no such exception to the rule. A distinction, however, must be observed. If a foreign revenue law makes an instrument void, it will be void everywhere. But, if the foreign law merely prescribes a formality of procedure, the *lex fori* will prevail.

Alves *v.* Hodgson, 7 T. R. 241; Clegg *v.* Levy, 3 Camp. 166; Bristow *v.* Sequeville, 5 Ex. 275; Satterthwaite *v.* Doughty, Busbee, 314; Lambert *v.* Jones, 2 Pat. & H. 144; Fant *v.* Miller, 17 Grat. 47.

According to a *dictum* of Lord Mansfield, in Robinson *v.* Bland, 2 Burr. 1078, and the opinion of Judge Story, Conf. Laws (7th ed.), § 280, when a contract is made in one country to be performed in another, its validity will be determined by the law of the place of performance. And this second exception to the general rule was adopted as the basis of decision in the following cases: Andrews *v.* Pond, 13 Pet. 77 (*semble*); Miller *v.* Tiffany, 1 Wall. 298 (*semble*); Junction R.R. *v.* Bank of Ashland, 12 Wall. 226; Thayer *v.* Elliott, 16 N. H. 102; Ball *v.* Consolidated Co., 32 N. J. 102 (*semble*); Campbell *v.* Nichols, 33 N. J. 81; Freese *v.* Brownell, 35 N. J. 285; Thompson *v.* Ketcham, 4 Johns. 285; Jacks *v.* Nichols, 1 Seld. 178; Curtis *v.* Leavitt, 15 N. Y. 91, 92 (*semble*); Scott *v.* Pillington, 15 Abb. 280; Berrien *v.* Wright, 26 Barb. 208; Cutler *v.* Wright, 22 N. Y. 472; Jewell *v.* Wright, 30 N. Y. 259; Hackettstown Bank *v.* Rea, 64 Barb. 175; Hildreth *v.* Shepard, 65 Barb. 265; Clayes *v.* Hooker, 4 Hun, 231.

But, with all deference, this exception to the rule has as little foundation in reason

as the other. To adopt the language of Wells, J., in Akers *v.* Demond, 108 Mass. 328: "The general principle is that the law of the place of performance is the law of the contract. This rule applies to the operation and effect of the contract, and to the rights and obligations of the parties under it. But the question of its validity, as affected by the legality of the consideration, or of the transaction upon which it is founded, and in which it took its inception as a contract, must be determined by the law of the State where that transaction was had. No other law can apply to it. Usury, in a loan effected elsewhere, is no offence against the laws of Massachusetts. . . . But when a usurious or other illegal consideration is declared by the laws of any State to be incapable of sustaining any valid contract, and all contracts arising therefrom are declared void, such contracts are not only void in that State, but void in every State and everywhere. They never acquire a legal existence." For decisions in accordance with this view, see Scudder *v.* Union Bank, 91 U. S. 406; Davis *v.* Clemson, 6 McL. 622; Providence Bank *v.* Frost, 50 How. Pr. 178; Adams *v.* Robertson, 37 Ill. 45 (qualifying McAllister *v.* Smith, 17 Ill. 328); Mix *v.* Madison Co., 11 Ind. 117; Butters *v.* Olds, 11 Iowa, 1 (but see Arnold *v.* Potter, 22 Iowa, 194); Depau *v.* Humphreys, 8 Mart. N. S. 1; Dunscomb *v.* Bunker, 2 Met. 8, 10; Akers *v.* Demond, 108 Mass. 318; Pratt *v.* Adams, 7 Paige, 632; City Bank *v.* Bidwell, 29 Barb. 325; Balme *v.* Wombough, 38 Barb. 352; State Bank *v.* Lewin, 45 Barb. 340 (*semble*); Bowen *v.* Bradley, 9 Abb. Pr. N. S. 395; First Nat. Bank *v.* Morris, 1 Hun, 680; Dickinson *v.* Edwards, 2 Abb. New Cas. 300; Atwater *v.* Roelofson, 2 Handy, 19; Rezner *v.* Hatch, 2 Handy, 42 (*semble*); Fisher *v.* Otis, 3 Chandl. 38; Richards *v.* Globe Bank, 12 Wis. 692; Vliet *v.* Camp, 18 Wis. 198. See also Fitch *v.* Remer, 8 Am. L. Reg. 654; Hanrick *v.* Andrews, 9 Port. 9; Roberts *v.* Wilkinson, 5 La. An. 369; Davis *v.* Coleman, 7 Ired. 424; Bullard *v.* Thompson, 35 Tex. 318.

The rate of interest payable by a defendant *ex mora* is governed by the *lex loci solutionis*. Cooper *v.* Waldegrave, 2 Beav. 282; Bank of United States *v.* Daniel, 12 Pet. 32, 54; Scudder *v.* Union Bank, 91 U. S. 406 (*semble*); Price *v.* Teal, 4 McL. 201; Dunn *v.* Clement, 2 Ala. 392; Dickinson *v.* Branch Bank, 12 Ala. 54; Hunt *v.* Hall, 37 Ala. 702; Hawley *v.* Sloo, 12 La. An. 815; Healy *v.* Gorman, 3 Green, 328; Foden *v.* Sharp, 4 Johns. 183; Schofield *v.* Day, 20 Johns. 102; Bain *v.* Ackworth, 1 Treadw. 107; McCandlish *v.* Cruger, 2 Bay, 377; Cooke *v.* Crawford, 1 Tex. 9; Burton *v.* Anderson, 1 Tex. 93; Wheeler *v.* Pope, 5 Tex. 262; Andrews *v.* Hoxey, 5 Tex. 171; Summers *v.* Hill, 21 Tex. 77; Austin *v.* Imus, 28 Vt. 236.

In Massachusetts, the singular rule prevails, that the rate of interest is determined by the *lex fori*. Grimshaw *v.* Bender, 6 Mass. 157; Ayer *v.* Tilden, 15 Gray, 178; Ives *v.* Farmers' Bank, 2 All. 236. — Ed.

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HUGH McCULLOCH AND OTHERS, RESPONDENTS, v. ORRIN C. HOFFMAN, IMPLEADED WITH GEORGE J. HOFFMAN, APPELLANT.

IN THE SUPREME COURT, NEW YORK, MARCH TERM, 1877.

[*Reported in* 10 *Hun*, 133.]

APPEAL from a judgment in favor of the plaintiff, entered on a verdict directed by the court.

C. W. Brooke, for the appellant.

T. H. Hubbard, for the respondents.

DAVIS, P. J. This action is brought upon a bill of exchange in the words and figures following: —

"£585 11*s.* 11*d.* LONDON, July 11, 1873.

"On demand, please pay to the order of Messrs. Jay Cooke, McCulloch, & Co. (duplicate unpaid), five hundred and eighty-five pounds eleven shillings and eleven pence, value received, which place to account of

"G. J. HOFFMAN.

"GEORGE HOFFMAN, Esq., O. C. HOFFMAN.

"*Pres. Irving National Bank, New York.*"

The defendant George J. Hoffman interposed no defence. The defendant Orrin C. Hoffman put in an answer admitting his signature to the bill of exchange, and alleging as a defence, in substance, that the bill was given by the defendant George J. Hoffman to the plaintiffs for advances theretofore made by them to George; that after the bill had been made by George it was presented to him by one of the plaintiffs, who represented to him that it had been drawn for advances made to George by the plaintiffs; that the drawee, who was the father of both the defendants, had refused to make pecuniary advances to his son George J. Hoffman, owing to his alleged excesses and improprieties, and would probably not accept the draft, but would be more likely to do so, should the defendant Orrin C. Hoffman also sign his name; and that, if his father did not accept it, it should never trouble the said Orrin C. Hoffman personally; and that the defendant did so subscribe his name at the request of the plaintiffs, without any consideration whatever; and that the bill of exchange was altogether without consideration in respect to him.

On the trial of the action, the plaintiff produced and read in evidence the bill of exchange, and proved, in substance, that the drawing thereof was unauthorized, and that the defendants had no funds in the hands of the drawee against which to draw, and rested.

On the part of the defence, it was proved that the bill was given for the balance of an account of George J. Hoffman with the plaintiffs, and was executed by said George J. Hoffman a day or two before it was signed by the defendant Orrin C. Hoffman, and that it had no consideration whatever except the indebtedness of said George J. Hoffman upon the balance of his account.

The defendant's counsel then offered, in various forms, to prove the circumstances connected with the affixing of Orrin C. Hoffman's signature to the bill, and the giving of it by him, substantially as alleged in his answer to the complaint. This was excluded by the court, on the ground that the defendant could not in that way contradict the bill of exchange; and exceptions were taken.

After proving that the bill of exchange was given for the balance of the account of George J. Hoffman, the following question was put to Orrin C. Hoffman: "What connection had you, if any, with that account, in any way?" This question was objected to: the objection was sustained, and an exception duly taken. Amongst other questions, also, the following were put to the defendant Orrin C. Hoffman: "Will you state precisely what occurred, and what was said at the time your signature was affixed to that draft, prior to the time and at the time your signature was affixed? What was said by Mr. Inleston to you immediately prior to your affixing your signature to this draft, in consequence of which you signed it, if any thing? Have you received any consideration for this draft; and were you a party to the transaction referred to in this account, for the balance of which it was given? Where did you sign it? Was there any agreement made between the payees of that draft and yourself, in accordance with which agreement you signed the draft?" All these questions were objected to: the objections were sustained, and exceptions duly taken. In respect to the question first above quoted, the exception seems to have been well taken. The defendant had the right to show distinctly that he had no connection with that account, although it appeared clearly that the bill was given for the balance of such account of his brother. In respect to the other questions, the evidence seems to have been rejected upon the ground that the agreement sought to be proved was not in writing, and that they were an attempt to contradict by oral evidence the terms of a written instrument.

At the close of the evidence, the defendant's counsel asked the court to charge the jury that, if they found as matter of fact that no consideration passed to Orrin C. Hoffman from the plaintiffs in this case, or from the person in whose favor the draft was drawn, that the verdict should be for the defendant Orrin C. Hoffman, and not for the plaintiffs. The court declined so to charge, and the counsel excepted.

It is well-established law that a party may always show want of consideration to invalidate a contract. To this rule there is but a single exception, which is the case of a negotiable promissory note or bill of exchange which has passed into the hands of a *bona fide* holder for value before maturity. In such a case, the want of consideration is no defence; but in every other case a total want of consideration is a perfect defence to an action upon any contract, whether verbal or written; and, under our statutes, sealed contracts are no exception to the rule.

For the purpose of establishing the defence of want of consideration, set up in the answer of Orrin C. Hoffman, it was competent to prove the facts and circumstances under which his signature was put to the bill of exchange. This action is between the original parties to the instrument. The consideration was therefore open to inquiry; and the facts and circumstances, even if they make out an oral agreement, were admissible for the purpose of establishing a total want of consideration. It was not sought thereby to vary the terms of the agreement, except in respect to its statement of a consideration for the making of the paper; but it was sought to be shown that no consideration whatever passed or existed as between the defendant Orrin C. Hoffman and the plaintiff, amounting to a sufficient consideration to uphold the bill.

In Benton *v.* Martin,[1] it was said: "Instruments not under seal may be delivered to the one to whom upon their face they are made payable, or who by their terms is entitled to some interest or benefit under them, upon conditions the observance of which is essential to their validity; and the annexing of such conditions to the delivery is not an oral contradiction of the written obligation, though negotiable, as between parties to it and others having notice. It needs a delivery to make the obligation operative at all; and the effect of the delivery, and the extent of the operation of the instrument, may be limited by the conditions with which delivery is made. And so, also, as between the original parties and others having notice, a want of consideration may be shown."

There is no difficulty in the proper application of this rule; and its restriction to the subject under investigation, to wit, a total want of consideration and what transpired at the time of making the paper, though it may not have been competent for the purpose of limiting the effect, or changing the character of the instrument itself, was, we think, certainly competent, as between the parties to the original paper, for the purpose of showing the absence of consideration, and the knowledge of the plaintiff that the paper was made wholly without

[1] 52 N. Y. 570.

consideration. We think the court was in error in excluding the several questions; and that such error was not cured by the fact that the evidence sought to be called out by the questions was obviously the same as that stated in the offers of the defendant's counsel, which embraced in part the unwritten agreement that the bill, if not accepted by the drawee, should not be enforced against the defendant.

It is not necessary to pass upon the question arising upon the refusal of the court to charge as requested.

The judgment must be reversed and a new trial ordered, with costs to abide event.

BRADY and DANIELS, JJ., concurred.

Judgment reversed, new trial ordered, costs to abide event.[1]

[1] See Druiff *v.* Parker, L. R. 5 Eq. 131; Jones *v.* Heiliger, 36 Wis. 149. — ED.

CHAPTER VII.

DILIGENCE.

SECTION I.

Presentment for Acceptance or Payment.

(a) Day of Presentment.

ANONYMOUS.

At Guildhall, coram Treby, C. J., Trinity Sittings, 1701.

[*Reported in* 1 *Lord Raymond*, 743.]

The custom of merchants is that if B, upon whom a bill of exchange is drawn, absconds before the day of payment, the man to whom it is payable may protest it, to have better security for the payment, and to give notice to the drawer of the absconding of B; and, after time of payment is incurred, then it ought to be protested for non-payment the same day of payment or after it.[1] But no protest for non-payment can be before the day that it is payable.[2] Proved by merchants at Guildhall. And the plaintiff was nonsuit, because he had declared upon a custom, to protest for non-payment before the day of payment. *Ex relatione Place.*

[1] Presentment for payment after the day of maturity is too late. Thornton *v.* Stodert, 1 Cranch, C. C. 534; Eldridge *v.* Rogers, Minor, 392; Platt *v.* Edis, 1 Blackf. 81; Jackson *v.* Union Bank, 6 Har. & J. 149; Orear *v.* McDonald, 9 Gill, 350; Woodbridge *v.* Brigham, 12 Mass. 403; Ferris *v.* Saxton, 1 South. 2; Brown *v.* Jones, 8 Johns. 230; Johnson *v.* Haight, 13 Johns. 470; Davis *v.* Herrick, 6 Oh. 56. — Ed.

[2] Jones *v.* Fales, 4 Mass. 245; Henry *v.* Jones, 8 Mass. 453; Hough *v.* Young, 1 Oh. 504, *accord*. — Ed.

TASSELL AND LEE v. LEWIS.

AT GUILDHALL, CORAM LORD HOLT, C. J., TRINITY SITTINGS, 1701.

[*Reported in* 1 *Lord Raymond*, 743.]

IN case of foreign bills of exchange, the custom is that three days are allowed for payment of them; and, if they are not paid upon the last of the said days, the party ought immediately to protest the bill and return it, and by this means the drawer will be charged: but if he does not protest it the last of the three days, which are called the days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it shall be reckoned his folly, that he did not protest, &c. But if it happens that the last day of the said three days is a Sunday or great holiday, as Christmas Day, &c., upon which no money used to be paid, there the party ought to demand the money upon the second day;[1] and, if it is not paid, he ought to protest the bill the said second day: otherwise, it will be at his own peril, for the drawer will not be chargeable. Merchants in evidence at a trial at Guildhall, Trin. 7 Will. III., before Holt, C. J., swore the custom of merchants to be such, which was approved by Holt, C. J. 2. There is no custom for the protest of inland bills of exchange, nor any certain time assigned by the custom for the payment of them: therefore, the money ought to be demanded in reasonable time, after it is payable; and then, if it is not paid, the drawer will be charged. See the Statute 9 Will. III. c. 17. 3. If the indorsee of a bill accepts but twopence from the acceptor, he can never after resort to the drawer. 4. The notes of goldsmiths (whether

[1] Bussard *v.* Levering, 6 Wheat. 102 (Sunday); Irwin *v.* Brown, 2 Cranch, C. C. 314 (Sunday); Barlow *v.* Gregory, 31 Conn. 261 (New Year's Day); Sheppard *v.* Spates, 4 Md. 400 (Sunday); Homes *v.* Smith, 20 Me. 264 (Sunday); Farnum *v.* Fowle, 12 Mass. 89 (Sunday); Fleming *v.* Fulton, 7 Miss. 473 (Sunday); Barlow *v.* Planters' Bank, 8 Miss. 129 (Sunday); Kuntz *v.* Tempel, 48 Mo. 71 (Sunday); Lewis *v.* Burr, 2 Cai. Cas. 195 (July 4th); Jackson *v.* Richards, 2 Cai. R. 343 (Sunday); Ontario Bank *v.* Petrie, 8 Wend. 456 (Sunday); Mechanics' Bank *v.* Gibson, 7 Wend. 460 (Sunday); Ransom *v.* Mack, 2 Hill, 587 (July 4th); Sheldon *v.* Benham, 4 Hill, 129 (July 4th); West *v.* Lee, 50 How. Pr. 318 (Sunday); Furnan *v.* Harman, 2 McC. 436 (Sunday), *accord*.

See City Bank *v.* Cutter, 8 Pick. 414 (Harvard Commencement Day); Dabney *v.* Campbell, 9 Humph. 680 (New Year's Day).

But the days of grace upon a bill or note nominally payable on Sunday are computed from that day, and not from the preceding Saturday. Wooley *v.* Clements, 11 Ala. 220. — ED.

they be payable to order or to bearer) are always accounted among merchants as ready cash, and not as bills of exchange. 5. The time of receiving money upon a goldsmith's note is immediately, or else it will be at the peril of him who has the note. He who delivers over the note will not be charged, if the goldsmith fail, as the drawer of a bill of exchange would be; but the receiver is supposed to give credit to the goldsmith, and the note is looked upon as ready money payable immediately; and, if he does not like, he ought to refuse it; but, having accepted it, it is at his peril. [But note, if the party to whom the note is delivered demands the money of the goldsmith in reasonable time, and he will not pay it, it will charge him who gave the note. Hopkins *v.* Geary.[1]] 6. A goldsmith's note indorsed is as a bill of exchange against the indorser.

MOORE *v.* WARREN.

AT GUILDHALL, CORAM PRATT, C. J., 1720.

HOLME *v.* BARRY.

AT GUILDHALL, CORAM KING, C. J., 1720.

[*Reported in* 1 *Strange*, 415.]

THE defendant in each of these actions, at two of the clock in the afternoon, gave the plaintiffs, goldsmiths, notes in payment, which were tendered the next morning at nine, when the goldsmiths had a quarter of an hour before stopped payment. The Chief Justices directed the juries that the loss should fall on the defendants, there being no laches in the plaintiffs, who had demanded their money as soon as was usual in the course of dealing, and that the keeping the notes till the next morning could not be construed a giving new credit to the goldsmiths. And both juries found accordingly.[2]

TURNER *v.* MEAD.

AT GUILDHALL, CORAM PRATT, C. J., 1720.

[*Reported in* 1 *Strange*, 416.]

THE defendant paid the plaintiffs, who were the sword-blade company, two goldsmith's notes at three in the afternoon; the plaintiffs'

[1] 7 Mod. 139.

[2] Fletcher *v.* Sandys, 2 Stra. 1248, *accord*.

See Hill *v.* Lewis, 1 Salk. 132; Skin. 410, s. c. — ED.

servant, the next morning, leaves the notes with the goldsmiths, in order to have the money ready for him as he came back a clearing; it being, as they proved, customary for the bank and the sword-blade company to send out their notes in the morning, and then call for the money as their servant returned in the evening; and the goldsmiths, upon receiving the notes, always cancelled them, and got the money told out against the time it was usually called for. The notes in this case were brought early in the morning, and received and cancelled; and, between four and five in the afternoon, the servant that left them called again for the money, when the goldsmiths had just stopped payment; upon which, the servant takes new notes of the same tenor and date with the cancelled ones he left in the morning. And, because the plaintiffs had done nothing but what was usual in leaving the notes instead of taking the money when he first called in the morning, the Chief Justice directed the jury to find for the plaintiffs, which they did.[1]

MANWARING v. HARRISON.

At Guildhall, coram Pratt, C. J., 1722.

[*Reported in* 1 *Strange*, 508.]

Upon the 17th of September (being Saturday), about two o'clock in the afternoon, Harrison gave to Manwaring in payment a note for £100 by Mitford and Mertins, goldsmiths, dated 5th of September, payable to Harrison or order. The same afternoon, Manwaring pays away the note to J. S.; Mitford and Mertins paid all Saturday and Monday; and on Tuesday morning, as soon as the shop was open, and before any money paid, J. S. came and demanded the money, but Mitford and Mertins stopped payment. Manwaring paid back the money to J. S., and demanded it again of Harrison; who refusing to pay it, an action was brought. And, on *non assumpsit*, the Chief Justice told the jury that giving the note is not immediately payment, unless the receiver does something to make it so by neglecting to receive it in a reasonable time, by which he gives credit to the maker of the note. He left it to them whether there had been any neglect, and observed that the note was payable to Harrison, who had kept it eleven days, and probably would not have demanded it sooner than Manwaring did, it appearing the goldsmiths were in full credit all the while. The

[1] Hoar v. Dacosta, 2 Stra. 910, *accord*.
Haward v. Bank of England, 1 Stra. 550, *contra*. — Ed.

jury desired they might find it specially, and leave it to the court whether there was a reasonable time; but the Chief Justice told them they were judges of that: whereupon, they found *pro def.*, and declared it as their opinion that a person who did not demand a goldsmith's note in two days took the credit on himself.[1]

COLEMAN v. SAYER.

AT NISI PRIUS, CORAM LORD RAYMOND, C. J., HILARY TERM, 1728.

[*Reported in* 1 *Barnardiston*, 303.[2]]

THE plaintiff brought an action against the defendant, as indorser of an inland bill of exchange, which was drawn by Holt upon Mead, a banker in London, payable six days after sight. One of the questions that fell out upon the evidence was, whether the day of sight is to be reckoned one of the six, admitting, first, that three days of grace are allowable in inland bills of exchange at all; and another, whether the three days' grace are allowable by the custom of London, as well where a bill is payable at certain days after sight as well as where it is payable upon sight. To the first of these questions, the Chief Justice, at the sittings in Guildhall, said that the day of sight is to be taken exclusive;[3] for the law will not allow of fractions in a day; and to the other, he said, the days of grace were allowable in one case as well as the other.[4] The other matter then came into debate

[1] Pepys *v.* Lambert, 2 Stra. 707, *accord.*

Conf. James *v.* Holditch, 8 Dow. & Ry. 40. — ED.

[2] 2 Stra. 829, s. c. — ED.

[3] Lester *v.* Garland, 15 Ves. 248, 254 (*semble*); Mitchell *v.* DeGrand, 1 Mas. 176; Hill *v.* Norvell, 3 McL. 583; Ammidown *v.* Woodman, 31 Me. 580; Henry *v.* Jones, 8 Mass. 453; Hartford Bank *v.* Barry, 17 Mass. 94; Roehner *v.* Knickerbocker Co., 63 N. Y. 160; Ripley *v.* Greenleaf, 2 Vt. 129, *accord.*

Bellasis *v.* Hester, 1 Ld. Ray. 280, *contra, is overruled.* — ED.

[4] Dehers *v.* Harriot, 1 Show. 163 (*semble*); Janson *v.* Thomas, 3 Doug. 421 (*semble*); Webb *v.* Fairmaner, 3 M. & W. 473, 474 (*semble*), (but see Stat. 34 & 35 Vict. c. 74, § 2; *supra*, p. 57, n. 1); Hart *v.* Smith, 15 Ala. 807; Knott *v.* Venable, 42 Ala. 186 (*semble*); Cribbs *v.* Adams, 13 Gray, 597; Spooner *v.* Rowland, 4 All. 485, 487 (statutory); Lucas *v.* Ladew, 28 Mo. 342 (*semble*); Walsh *v.* Dart, 12 Wis. 635 (statutory), *accord.*

Trask *v.* Martin, 1 E. D. Sm. 505; Nimick *v.* Martin, 1 U. S. Monthly L. Mag. 15 (usage), *contra.*

See Montelius *v.* Charles, 76 Ill. 303; Prescott Bank *v.* Caverly, 7 Gray, 217; Jordan *v.* Wheeler, 20 Tex. 698; Nichols *v.* Blackmore, 27 Tex. 586.

Whether bills payable at sight are entitled to days of grace is determined in many States by local statutes.

Bills payable at a certain time after sight have always been entitled to days of

whether three days of grace in certain are allowable upon inland bills as well as upon foreign ones, or whether only a reasonable time. The common serjeant and the foreman of the jury said that the constant practice in the city was to allow them in one case as well as the other. Upon which, the Chief Justice said that then he would not alter it; though he observed that he remembered two cases — one in Lord Chief Justice Kelynge's time, the other in Lord Holt's — where they were both of opinion that in inland bills it is only a reasonable time; and what that is the jury ought to determine. These three points were mentioned, because, if the court had been of another opinion as to any one of them, the plaintiff must have clearly been nonsuited; for it fell out upon the evidence to be proved that the acceptor of this bill went off the second day after the three days of grace were over; and the bill was not noted within that time. But, however, even as this case was, the Chief Justice was of opinion the indorser was not liable, and accordingly the plaintiff was nonsuited.

HANKEY *v.* TROTMAN.

In the King's Bench, Michaelmas Term, 1746.

[*Reported in* 1 *William Blackstone*, 1.]

Motion for a new trial. Plaintiff was a banker; had a bill on defendant, for which the defendant gave him a bill on another banker, at twelve at noon, who stopped payment before the next morning. The question was, whether plaintiff or defendant should stand to the loss, or whether there was any laches in the plaintiff, who got the bill marked for acceptance the same night. On the trial, the jury found a verdict for the defendant.

Sir John Strange, *Sir R. Lloyd*, and *Mr. Ford* argued for the plaintiff that he endeavored to receive the bill as soon as in the common course of business it used to be received, and that some time must be allowed for the circulating paper credit.

Mr. Hume Campbell and *Stracey*, contra, laid it down that a trading jury was the best judge of this case, and had not gone against law in this verdict, the law not having prescribed any time for receiving

grace. Leftley *v.* Mills, 4 T. R. 170; Brown *v.* Turner, 11 Ala. 752; Trask *v.* Martin, *supra*.

Bills payable on demand are payable without grace. Hart *v.* Smith, *supra*; Piner *v.* Clary, 17 B. Mon. 645, 668; Barbour *v.* Bayon, 5 La. An. 304; Trask *v.* Martin, *supra*; Hazleton *v.* Colburn, 1 Rob. (N. Y.) 345, 348. — Ed

bills; and that the court was not to interpose, unless the jury was manifestly wrong.

Per Curiam, LEE, C. J. I was of opinion for the plaintiff at the trial, though there was variety of evidence; but doubt whether the verdict can be set aside, as it is a question of fact whether there was convenient time allowed for receiving the money.

WRIGHT, J. The jury is the proper judge of circumstances and facts. But the question here is, whether the plaintiff had any time at all. Some time must be allowed: therefore, I doubt whether the verdict is not against evidence, imputing laches to the plaintiff where there was none.

DENISON, J. Both juries and judges have been of different sentiments as to this point. The question is, whether the plaintiff has used a reasonable diligence or not. This the jury are to judge of. There certainly was time, though by incidental circumstances it was very straight. The precedent would be dangerous to set aside a verdict which is neither against law nor evidence.

FOSTER, J. Reasonable time is what is sufficient to receive it in. The verdict is not against evidence. Bankers have no right to establish a customary law among themselves at the expense of other men.

Rule nisi for a new trial discharged[1]

BROWN v. HARRADEN.

IN THE KING'S BENCH, FEBRUARY 1, 1791.

[*Reported in* 4 *Term Reports*, 148.]

THIS was an action on a promissory note by the indorsee against the indorser. The declaration stated that W. German on the 15th of September, 1789, made the note in question for £20, payable to the defendant or order on the 2d of November; it then deduced a title to the plaintiff, and averred a refusal to pay by the defendant on the 2d of November. The defendant pleaded a tender on the 5th of November. The plaintiff replied that he sued out a bill of Middlesex on the 4th of November, and that the defendant did not at any time before that day tender the £20, &c. Rejoinder, that the bill of Middlesex was sued out on the 4th of November, and that before that time the defendant was not by force of the statute liable to pay, &c., nor did he promise to pay before, &c. Surrejoinder, that he did

[1] This case is overruled. See Medcalf v. Hall, 8 Doug. 118; Appleton v. Sweetapple, 8 Doug. 137; Robson v. Bennett, 2 Taunt. 388. — ED.

become liable by force of the statute before the suing out of the bill of Middlesex, and promised, &c. To this there was a general demurrer and joinder.

Holroyd, in support of the demurrer.[1]

Lawes, contra.

Lord Kenyon, C. J. This question is of such infinite importance in every hour's transaction in the commercial world that (I think) we should not discharge our duty to the public, if we were to keep this matter in suspense; and we are the more ready to deliver our opinion as this question is upon the record; for, if our judgment be erroneous, it may be corrected by a superior tribunal. It is not necessary now to consider whether or not Lord Holt were right in so pertinaciously adhering to his opinion before the statute of Anne, that no action could be maintained on promissory notes, as instruments, but that they were only to be considered as evidence of the debt. That question exercised the judgments of the able men at that time; but the authority which his opinion had in Westminster Hall made others yield to him, and it was thought necessary to resort to the Legislature to apply a remedy. It is extremely clear that on foreign bills of exchange three days' grace are allowed. I think it is as little to be doubted that they are also allowed on inland bills; and that observation is of some use as applicable to some of the authorities which have been cited. It is not too much to say that in former times, recently after the passing of the statute of Anne, this kind of questions was not so well understood as they have been since: the judges were not so conversant with the subject; but they have now raised a system to answer the exigencies of the public, without departing from the rules of law. But when it is stated in Lord Raym. 743, that there was no certain time assigned by the custom of merchants for the payment of inland bills of exchange, it only shows that the judges were very cautious on the subject; but now it has been settled for more than half a century that they are payable at the same time as foreign bills of exchange. Then it has been argued that there is a substantial difference between bills of exchange and promissory notes, and that there are reasons why the acceptor of the one should be allowed more time than the maker of the other; but I confess I see no difference whatever: they both make engagements of the same nature; and, when the acceptor

[1] The arguments of counsel have been omitted. *Holroyd* cited Welch v. Craig, 8 Mod. 373; Heylyn v. Adamson; Grant v. Vaughan; Rawlinson v. Stone; Bull. N. P. 277; 2 Bl. Com. 469, 470; Buller v. Cripps; Tassell v. Lewis; and Tindal v. Brown, 1 T. R. 167.

Lawes cited Clarke v. Martin; Williams v. Cutting, 2 Ld. Ray. 825; Potter v. Pearson, 1 Salk. 129; May v. Cooper, Fortesc. 376; and Dexlaux v. Hood, Bull. N. P. 274. — Ed.

has accepted a bill, he is equally bound to be prepared to pay on the day appointed as the maker of the promissory note.

Then the ground on which our judgment must proceed is the statute of Anne; since which the holder of a promissory note may declare upon it according to the form of the statute, though not according to the custom of merchants. The words of the preamble ought to decide the question, which the common usage of mankind has since put into a state of repose. It recites that promissory notes were not assignable or indorsable within the custom of merchants, and that the indorsee could not maintain any action upon them, within the custom of merchants; "therefore, to the intent to encourage trade and commerce, which will be much advanced if such notes shall have the same effect as bills of exchange, and shall be negotiated in like manner, &c.," it is enacted, &c. The struggle between the merchants and the courts of law before this statute was whether the party could declare on these notes according to the custom of merchants. Lord Holt thought not; but this statute, which was passed at the instance of the merchants, has made them that which they were not before; and they are now, with the assistance of the statute, acted upon as if they had been within the custom of merchants. The operative part of the statute proceeds to say that such "notes shall be assignable and indorsable over in the same manner as inland bills of exchange;" that the holders may maintain actions on them in such manner as they might upon inland bills of exchange against the makers or against the indorsees, in like manner as in cases of inland bills of exchange, &c. In short, they were wholly to assume the shape of inland bills of exchange. The case cited from Fortescue, indeed, is undoubtedly against our opinion; but that case was determined when the doctrine on paper currency was not so well established as it has been since, and it has been constantly contradicted by the uniform practice to this time, and by the courts of law. The case of Tindal *v.* Brown is, in my opinion, very important: that case was argued several times in this court, and afterwards in the Exchequer Chamber; but this question was not even raised, though it would have been decisive, if well founded; and it was taken for granted in all the different stages of that cause that the laches of the holder did not commence until the expiration of the three days' grace. Therefore, on the Act of Parliament and on the authorities, I think we are warranted in deciding that the three days' grace ought to be allowed on promissory notes as well as on bills of exchange, and consequently that the tender made by the defendant in this case is a sufficient answer to the plaintiff's action. In addition to these considerations, we are now told that it has been the constant practice at the bank and at the principal bankers to make this allow

ance on promissory notes. Then, if we were to make a decision in opposition to all this practice, it would be attended with the most serious consequences; for these notes are circulated not only throughout this country, but also over several other countries in Europe. Many of them have been discounted and interest taken, on the supposition that three days' grace are allowed; but, if we were to determine that no such allowance ought to have been made, all those parties would be involved in the crime of usury; and, again, all holders of notes, who made no demand on the makers till the expiration of the three days, and who afterwards resorted to the indorsers, will have been guilty of laches. Therefore, I am glad to find that the latter judicial determinations, and the statute of Anne, which was passed for the purpose of putting promissory notes on the same footing with bills of exchange, warrant the practice which has obtained in this respect, notwithstanding the former cases seem to be against it.

ASHHURST, J. I am glad that this case is brought before the court, in order to be solemnly determined; though I confess it is a matter of astonishment to me that this question could ever have admitted a doubt since the statute of Anne, which was passed in order to put promissory notes on the same footing with bills of exchange in all respects. The preamble of that act declares that, for certain reasons there mentioned, both ought to be put on the same footing; and the enacting part says that actions may be brought on the one in the same manner as on the other. Now, if they were to differ in so essential a point as that now contended for by the plaintiff, they could not be said to be put on the same footing; nor could actions be brought on promissory notes in the same manner as on bills of exchange, if actions on the former might be commenced three days sooner than on the latter. And it happens very fortunately that, in putting this construction on the statute of Anne, our opinion will meet the general concurrence of mankind.

BULLER, J. The question, whether three days' grace shall or shall not be allowed on promissory notes has for many years past been *vexata quæstio* in Westminster Hall; but the practice among merchants and bankers has been uniform in favor of the indulgence. The doubt which has arisen in our own time has been principally founded on the determination of Mr. J. Denison at Nisi Prius; though it appears that the jury there said that the judge's opinion was against the practice, and that case has always been handed down in print with a *quære*. And, since I have sat upon the bench, I have always held at Nisi Prius that the three days are allowed, whether the question has arisen on the supposed laches of the holder or in cases of usury. The cases cited by the defendant's counsel are extremely material; for,

though they do not directly decide the question, they show that the courts of Westminster have thought the analogy between bills of exchange and promissory notes so strong that the rules established with respect to one ought also to prevail as to the other. Such is the general tendency of all the cases since Lord Mansfield's time. Many of the cases alluded to by the plaintiff's counsel happened before the statute of Anne: they only show the strong disposition which Lord Holt manifested on all occasions to discourage promissory notes. It appears from them that Lord Holt and the merchants were perpetually disputing whether or not they should be put on the same footing with bills of exchange. The merchants did not contend that they might recover on notes in particular cases only, but that notes should be universally considered in the same light as bills of exchange. Upon that ground, they applied to the Legislature for relief; and their conduct is very strong to show what construction the statute of Anne ought to receive. The language of the preamble is express that it was the object of the Legislature to put promissory notes exactly on the same footing with inland bills of exchange; and the enacting part pursues that intention. Therefore, though it has been now attempted to make a distinction between bills of exchange and promissory notes, and to show that the former only are beneficial to trade and commerce, yet that argument is not now open, for the Legislature have said directly the reverse, and that it is for the benefit of commerce that they should be on the same footing. The other cases, cited by the plaintiff's counsel, show how little the law on this subject was formerly understood; but, whenever this kind of cases has been discussed of late years, the judges have all agreed that it is essential to the welfare of the trade and commerce of the country that some certain rules should be established to govern all cases in future. With regard to the custom of merchants, it is true that a party cannot declare on notes on the custom, but he may declare on the statute, which shows that the Act of Parliament has been considered in the courts of law as putting them on the same footing with bills of exchange.

GROSE, J. On reading the words of the statute of Anne, I have no doubt whatever but that to this purpose notes are put exactly on the same footing with bills of exchange. It is also of great importance to consider that the contemporaneous usage and the modern practice agree with this construction; and therefore it would be attended with the most mischievous consequences, if we were now to put a different construction on it. The late cases, Heylyn *v.* Adamson, Grant *v.* Vaughan, and Tindal *v.* Brown, though not precisely in point, are strong to show that the law is as it has been now declared to be. The

case of May v. Cooper is indeed strong the other way; but that case cannot be supported: the true answer to it is that, when it was determined, these commercial subjects were not so well investigated, nor consequently so well understood, as they are at this time. And it is very probable that Mr. J. Denison formed his opinion in Dexlaux v. Hood on that of May v. Cooper; but he was misled by it. Therefore, on the general reasoning of the cases cited by the defendant's counsel, and on the clear and evident intention of the Legislature in passing the statute of Anne, I am of opinion that the three days' grace ought to be allowed on promissory notes as well as on bills of exchange.

Judgment for the defendant [1]

MUILMAN AND ANOTHER v. D'EGUINO.

IN THE COMMON PLEAS, NOVEMBER 25, 1795.

[*Reported in* 2 *Henry Blackstone*, 565.]

DEBT on bond, the condition of which, after reciting that Chamberlain Goodwin had on the 5th of March, 1793, in London, drawn five sets of bills of exchange, four in each set, on Major William Palmer, at the house of Messrs. Palmer & Tucker at Calcutta, payable to the defendant or order sixty days after sight, and by him indorsed to the plaintiffs, was that, if the said five sets of bills of exchange, or any

[1] Adams v. Otterback, 15 How. 539; Hill v. Norvell, 3 McL. 588; Crenshaw v. McKiernan, Minor, 295; Sommerville v. Williams, 1 Stew. 484; Bell v. Sackett, 38 Cal. 407; Norton v. Lewis, 2 Conn. 478; Savings Bank v. Bates, 8 Conn. 505; Hudson v. Matthews, Morris (Iowa), 94; Kimball v. Fuller, 13 La. An. 602; Wood v. Corl, 4 Met. 208; Bank of Utica v. Wager, 2 Cow. 766; Hogan v. Cuyler, 8 Cow. 203; Dolifus v. Frosch, 1 Den. 367; Smith v. Aylesworth, 40 Barb. 104; Cook v. Darling, 2 R. I. 385; Lovel v. Wartenburgh, 1 N. & McC. 83; Love v. Nelson, Mart. & Y. 237; Moore v. Hollaman, 25 Tex. Supp. 81, *accord*.

May v. Cooper, Fortesc. 376; Dexlaux v. Hood, Bull. N. P. 274; McLain v. Rutherford, Hempst. 47; Dalton Co. v. Haddock, 54 Ga. 584; Jones v. Fales, 4 Mass. 245; Harrel v. Bixler, 1 Miss. 173; Coxe v. Reinhardt, 41 Tex. 591, *contra*.

See Elston v. Dewes, 28 Ill. 436; Reese v. Mitchell, 41 Ill. 365; Jarvis v. McMain, 3 Hawks, 10; Field v. Mallett, 3 Hawks, 465.

The parties to a bill or note, payable by instalments, are entitled to the usual days of grace upon each instalment. Oridge v. Sherborne, 11 M. & W. 374; Eastman v. Turman, 24 Cal. 379; Coffin v. Loring, 5 All. 153; Fitchburg Co. v. Davis, 121 Mass. 121.

A bill or note will of course be payable without grace, if it contain a stipulation to that effect. Durnford v. Patterson, 7 Mart. 460; Perkins v. Franklin Bank, 21 Pick. 183 (*semble*), Mech. Bank v. Merch. Bank, 6 Met. 13.

A note payable on demand is payable without grace. Sommerville v. Williams, 1 Stew. 484. See *supra*, p. 60, n. 2. — ED.

one bill of any or either set, should be returned and come back to England, duly protested for non-payment, no one bill of that set having been paid, and if the said Chamberlain Goodwin, or the defendant, or either of them, their or either of their executors, &c., should and did within thirty days next, after the said five sets of bills or any one bill of any or either set so returned protested for non-payment should be produced with a regular protest for non-payment to the said Chamberlain Goodwin, and the defendant or either of them, their executors, &c., or notice thereof in writing left at their or either of their usual place of abode, pay to the plaintiffs the full amount of such bill or bills of exchange as should be so returned with protest, &c., &c., then the obligation to be void, &c., which being read, &c., the defendant pleaded:—

1. That not any one bill of exchange of any or either of the said five sets of bills had been returned and come back to England, duly protested, within the true intent and meaning of the condition.

2. That the defendant had well and truly paid to the plaintiffs within the time in the condition mentioned the full amount of such of the said bills as had been returned with protests for non-payment, &c.

3. That by reason of the neglect and default of the plaintiffs, not any one bill of any of the said five sets was presented or shown to the said Major William Palmer, at the house of Messrs. Palmer & Tucker at Calcutta, or at any other place, within a reasonable time next after the drawing and indorsing of the same, respectively.

4. The same in the former part as the 3d, with the addition that, by reason of the premises, the defendant had not notice so soon as he otherwise would and ought to have had that the said Major William Palmer would not accept or pay the said bills or any of them.

5. That all the bills of the said five sets, which were returned and came back to England protested for non-payment, were so returned, and so came back through the default of the plaintiffs.

Replication. 1. That one bill of each of the five sets had been returned and come back to England, duly protested for non-payment, within the true intent and meaning of the condition, concluding to the country.

2. That the defendant had not paid to the plaintiffs within the time in the condition mentioned the full amount of such of the bills as had been returned with protests, &c., with the same conclusion.

3. That one bill of each set was presented to Major William Palmer, at the house of Palmer & Tucker at Calcutta, within a reasonable time after the drawing and indorsing, &c., with the same conclusion.

4. That one bill of each set was presented to the said Major William

Palmer, at the house of Palmer & Tucker at Calcutta, within a reasonable time after the drawing and indorsing, without any default of the plaintiff, with the same conclusion.

5. That all the bills of the five sets which were returned and did come back to England protested for non-payment were not so returned, and did not so come back to England, through the neglect or default of the plaintiffs, with the same conclusion.

On these issues, a verdict was found at Guildhall for the plaintiffs, the following being the facts of the case: On the 5th of March, 1793, the bills were drawn by Goodwin on Palmer in Calcutta, in favor of the defendant, and on the same day indorsed by him for their full value, in a course of negotiation on the Royal Exchange, to the plaintiffs, who had previously received directions from Biderman & Co., of Paris, with whom they had a correspondence, to procure bills on India. The plaintiffs then sent advice to Biderman & Co. of their having procured the bills, and at the same time drew on Biderman & Co. for the amount of them, by way of indemnifying themselves, and requested farther orders as to the persons to whom the bills in question should be indorsed. On the 17th of March in the same year, Goodwin wrote general letters of advice to the drawee, which were sent on board an East India ship, which sailed with several others from Spithead on the 5th of April, and arrived at Calcutta early in September. On the 19th of April, Goodwin stopped payment. On the 30th of April, four of the bills were indorsed by the plaintiffs (by the direction of Biderman & Co. from whom they had heard in the mean time, and who had paid the bills which the plaintiffs had drawn on them as an indemnity) to the order of Deverin of Calcutta, and the fifth to the order of Pelon of the same place, for value in account with Biderman & Co. On the 22d of May, the bills were sent to India, by another fleet of Indiamen, which sailed on that day, and arrived in the Huguely River on the 3d of October. On the 5th of October, the holder of the bills wrote to the drawee, who was not then at Calcutta, informing him of the arrival of the bills, and requesting his acceptance of them, which by letter of the 17th of October he refused. In consequence of which, four of the bills were protested for non-acceptance on the 29th of October, and the fifth on the 18th of November, 1793. Four were protested for non-payment on the 1st of December, 1793, and the fifth on the 3d of January, 1794, and were all returned by the first English ships which sailed from India on the 23d of February, and arrived in England in July, 1794. But it also appeared that the plaintiffs had received, by the accidental conveyance of a foreign ship not bound to England, a letter from their agents at Calcutta (with whom the holders of the bills had a constant communication) dated 11th December,

1793, respecting some other bills, but which was totally silent as to the bills in question.

A rule having been granted to show cause why there should not be a new trial, the Lord Chief Justice reported the evidence as above stated, and said that at the trial the material questions he had left to the consideration of the jury were, whether the bills were presented to the drawee in reasonable time, which included the question, whether they were sent from England in reasonable time, and also whether proper notice had been given to the defendant of their non-payment. That his lordship was of opinion that there was no rule of law to fix the time when foreign bills should be sent to the place of their destination, and that the jury were to determine what was reasonable time for that purpose. That, under the particular circumstances of this case, he thought the bills had been transmitted in reasonable time to India, having been originally put up on the Exchange for negotiation, and therefore liable to be delayed here, and purchased by the plaintiffs as the agents of Biderman & Co., who were to give their orders for the disposal of them. As to the time of their being presented in India, after their arrival in that country, there was no evidence to show that they were not presented in reasonable time; and it must be always in the discretion of the holder of bills drawn payable at sight, or a certain time after, at what time they should be presented. That with respect to the notice of the bills being dishonored, it appeared that due notice of that circumstance had been given to the defendant in this case; for it would be too strict a rule to lay it down that the party in India should be bound to send notice to England, by the chance conveyance of a foreign ship, and that in this instance notice had been sent by the first regular ships which sailed from Bengal to this country.

Le Blanc, Serjt., in showing cause, repeated in substance the observations of his lordship to the jury.

Adair and *Heywood*, Serjts., on the other hand, contended that due diligence had not been used (which it was necessary in all cases for the holders of bills of exchange to use) either in sending the bills to India by the first ships which sailed from England after the indorsement to the plaintiffs, and which delay was occasioned by their seeking an indemnity for themselves from Biderman & Co.; or in presenting the bills in India for acceptance, which might and ought to have been done by the holders, without waiting for the drawee's letter of the 17th of October, as his residence was known, though he was absent from Calcutta; or in returning them as soon as possible to England, with due notice of their non-payment, for it was evident that the plaintiff's agents or the holders of the bills in India did not avail

themselves of the same opportunity which the foreign ship offered of sending the letter of 11th of December, also to send the bills protested for non-payment.

LORD CHIEF JUSTICE EYRE. The course of the argument in this case does not call upon the court to lay down any new rule as to bills of exchange payable at sight or a given time after: if it did, and it were necessary, I should feel great anxiety not to clog the negotiation of bills circumstanced like the present. It would be a very serious and difficult thing to say that a person buying a foreign bill, in the way that these bills were bought, should be obliged to transmit it by the first opportunity to the place of its destination. There would also be a great difficulty in saying at what time such a bill should be presented for acceptance. The courts have been very cautious in fixing any time for an inland bill, payable at a certain period after sight, to be presented for acceptance; and it seems to me more necessary to be cautious with respect to a foreign bill payable in that manner. If instead of drawing their foreign bills payable at usances, in the old way, merchants choose for their own convenience to draw them in this manner, and to make the time commence when the holder pleases, I do not see how the courts can lay down any precise rule on the subject. I think indeed that the holder is bound to present the bill in reasonable time, in order that the period may commence from which the payment is to take place. The question, what is reasonable time, must depend on the particular circumstances of the case; and it must always be for the jury to determine whether any laches is imputable to the plaintiff. With respect to point of notice of the non-payment being delayed, I think there is no color for that part of the argument; for I hold that it is sufficient for the party in India to send notice by the first regular ships going to England, and that he is not bound to accept the uncertain conveyance of a foreign ship.

But, upon the whole, my opinion proceeds on the facts of this particular case. I am satisfied with the finding of the jury: the question, whether there had been any laches, was left to them. which it was for them to decide, and they have found that no blame was to be imputed to the plaintiffs.

BULLER, J. This case may be decided on the facts peculiar to itself without infringing any rule of law. The only rule that I know of, which can be applied to all cases of bills of exchange, is that due diligence must be used. Due diligence is the only thing to be looked at, whether the bill be a foreign or an inland one, and whether it be payable at sight, at so many days after, or in any other manner. And the learning on this point is well laid down by Lord Mansfield in Heylyn v. Adamson. Then the question is, whether due diligence was used

by the plaintiffs in this case. Upon all the facts, the jury have found that there was no laches in the plaintiffs; and there is nothing in the state of those facts, as they appear upon the evidence, to warrant the court to say that the verdict is against law. But here I must observe that I think a rule may thus far be laid down as to laches, with regard to bills payable at sight, or a certain time after sight; namely, that they ought to be put in circulation. If they are circulated, the parties are known to the world, and their credit is looked to; and, if a bill drawn at three days' sight were kept out in that way for a year, I cannot say there would be laches. But if, instead of putting it in circulation, the holder were to lock it up for any length of time, I should say that he was guilty of laches. But farther than this no rule can be laid down. With respect to the notice, it was clearly sufficient to send it by the ordinary mode of conveyance. I do not say that the party was bound to send the protest by an English ship; but it was enough to do so by the first ship, whether English or foreign, that was going to England in the regular course of conveyance.

HEATH, J., of the same opinion. No rule can be laid down as to the time for presenting bills drawn payable at sight or a given time after. In the French Ordinances of 1673, Postlethwaite's Dict. tit. Bills of Exchange, it is said that a bill payable at sight or at will is the same thing; and this agrees with Marius.

ROOKE, J., of the same opinion. *Rule discharged.*[1]

[1] In the following cases, the presentment was held to be seasonable: Fry *v.* Hill, 7 Taunt. 395 (inland bill, 1 month); Goupy *v.* Harden, 7 Taunt. 159 (foreign bill, 1 month); Mellish *v.* Rawdon, 9 Bing. 416 (foreign bill, 5 months); Shute *v.* Robins, 3 C. & P. 80; M. & M. 133, s. c. (inland bill, 10 days); Godfray *v.* Coulman, 13 Moo. P. C. 11 (foreign bill, 37 days); Wallace *v.* Agry, 4 Mas. 336; 5 Mas. 118, s. c. (foreign bill, 2½ months); Montelius *v.* Charles, 76 Ill. 303 (foreign bill, 35 days); Bolton *v.* Harrod, 9 Mart. 326 (foreign bill, 1 week); Richardson *v.* Fenner, 10 La. An. 599 (inland bill, 3 months); Prescott Bank *v.* Caverly, 7 Gray, 217 (foreign bill, 4 days); Robinson *v.* Ames, 20 Johns. 146 (foreign bill, 2 months); Aymar *v.* Beers, 7 Cow. 705 (foreign bill, 29 days); Jordan *v.* Wheeler, 20 Tex. 698 (foreign bill, 34 days); Nichols *v.* Blackmore, 27 Tex. 586 (inland bill, 47 days).

In the following cases, the presentment was held to be too late: Straker *v.* Graham, 4 M. & W. 721 (foreign bill, 2½ months); Olshausen *v.* Lewis, 1 Biss. 419 (foreign bill, 1 month); Phœnix Co. *v.* Gray, 18 Mich. 191 (foreign bill, 21 days); Linville *v.* Welch, 29 Mo. 203 (foreign bill, 7 weeks); Salisbury *v.* Renick, 44 Mo. 554 (foreign bill, 4 months); Benton *v.* Martin, 31 N. Y. 382; 40 N. Y. 345; 52 N. Y. 570 (inland bill, 30 days); Fernandez *v.* Lewis, 1 McC. 322 (foreign bill, 2 months); Walsh *v.* Dart, 23 Wis. 334 (foreign bill, 14 days).

See Bachelor *v.* Priest, 12 Pick. 406. In Mellish *v.* Rawdon, *supra*, Tindal, C. J., said, p. 423: "Whether there has been in any particular case reasonable diligence used, or whether unreasonable delay has occurred, is a mixed question of law and fact, to be decided by the jury acting under the direction of the judge, upon the particular circumstances of each case. The judgment of the Court of Com-

MOSES PATIENCE v. A. TOWNLEY.

In the King's Bench, Hilary Term, 1805.

[*Reported in* 2 *Smith.* 223.]

This was an action on a bill of exchange by the holder against one of the antecedent parties thereon. It was drawn on the 1st of June, 1800, at three months' usance on Leghorn, and was due on the 10th of September, 1800, but was not presented either for acceptance or payment until the 31st of October, 1800. The protest stated that it was not paid, because not presented in due time. At the trial before Lord Ellenborough, C. J., at Guildhall, at the sittings after last term, this was relied upon as a defence to the action; but the plaintiff proved that, from the particular situation of the country, Leghorn being then occupied by the enemy, or in some such critical situation, though the bill was sent out by the plaintiff for the purpose of being presented, it was impossible to present it in due time, and was presented as early as could be afterwards, and there was a verdict for the plaintiff.

Erskine now moved for a new trial, on the ground that it should have been stated in the declaration that the presenting of the bill for acceptance and payment was delayed and prevented by the special circumstances of the case as above; and that evidence of the impos-

mon Pleas in the case of Muilman *v.* D'Eguino seems to us to lead directly to this conclusion, and to no other. And although one expression used by Mr. Justice Buller in giving his judgment is much relied on by the defendant, namely, that, 'if instead of putting the bill into circulation, the holder were to lock it up for any length of time, I should say he was guilty of laches,' such expression, when properly considered, only leaves the rule above laid down as uncertain and undefined in its application as it was before. 'To lock the bill up for any length of time' does not, and cannot, mean that keeping it in his hands for any time, however short, would make him guilty of laches. It never can be required of him, instantly on the receipt of it under all disadvantages, either to put it into circulation or to send it forward to the drawee for acceptance. To hold the purchaser bound by such an obligation would greatly impede, if not altogether destroy, the market for buying and selling foreign bills, to the great injury, no less than to the inconvenience, of the drawer himself. For, if he has no opportunity to realize his bill by sale at home, he can only obtain the amount by sending it out to a correspondent at the place upon which it is drawn, incurring thereby delay, expense, and risk; and, if the buyer is not to be allowed a reasonable discretion as to the time of parting with the bill, how can the drawer expect to find a ready sale? The meaning, therefore, of the expression above referred to is, and, indeed, the very form of the expression denotes it, that he must not lock the bill up for an indefinite time; that there must be some limit to its being kept from circulation; and what limit can there be, except that the time during which it is locked up must be reasonable? But what is or is not reasonable for that purpose a jury must, with the assistance of the judge, under all the circumstances of the particular case, determine." — Ed.

sibility of presenting it in due time, could not be given under the ordinary averment in this case that the bill was duly presented. But by

Lord Ellenborough, C. J. "Duly presented is presented according to the custom of merchants, which necessarily implies an exception in favor of those unavoidable accidents which must prevent the party from doing it within the regular time; and it was left to the jury to say whether from the situation of the country it was possible for the plaintiff to present it in due time." *Rule nisi refused.*[1]

RICKFORD AND OTHERS v. RIDGE.

At Nisi Prius, coram Lord Ellenborough, C. J., December 20, 1810.

[*Reported in* 2 *Campbell*, 537.]

Money had and received to recover back a sum of £300 paid by the plaintiffs to the defendant under the following circumstances:—

The plaintiffs are bankers at Aylesbury in the county of Buckingham. At noon, on the 13th day of June last, the defendant asked them to cash for him a check, dated on the 11th of the same month, drawn by Mingay, Nott, & Co., salesmen in Smithfield, on Smith, Payne, & Co., bankers in the city of London. The plaintiffs gave him country notes for the amount, which were duly paid. The post leaves Aylesbury at six in the evening. The plaintiffs did not send off the check by the post of the 13th, but by a coach which started at eight o'clock in the morning of the 14th. It was directed to Praed & Co., bankers, in Fleet Street, the plaintiffs' agents in town, who received it between three and four in the afternoon of the same day. They presented it for payment about eleven in the forenoon of the 15th, when the answer was, "No effects: must see the drawers." Mingay, Nott, & Co. paid at their own counter till four on the 15th; but no application was made to them to pay this check. Notice of its dishonor was given to the defendant on the 16th. The clerks of Praed & Co. stated that, had the check arrived by post on the forenoon of the 14th, they should not have presented it before the 15th. They send out checks and bills for payment only once a day; and, as this is generally before

[1] Dunbar v. Tyler, 44 Miss. 1 (*semble*). Durden v. Smith, 44 Miss. 548 (*semble*), *accord*.

See Barker v. Parker, 6 Pick. 80.

Conf. Aborn v. Bosworth, 1 R. I. 401 (as to delay caused by the loss of a bill) Wilson v. Senier, 14 Wis. 380 (as to delay caused by the illness of the holder.)

letters by the post are delivered, checks and bills contained in such letters remain with them till the following morning. Clerks from other bankers in Fleet Street swore that this is according to the manner in which they carry on business in that part of the town.

A gentleman of the special jury observed (and it was on both sides allowed to be so) that the practice is different with all London bankers east of St. Paul's, who present for payment all checks and bills the very same day they receive them by the post.

The *Attorney-General*, for the plaintiffs, insisted that they were not bound to send off this check to London sooner than by the post of the 14th, the day after they received it. The transmitting of a check from the country he compared to giving notice of the dishonor of a bill of exchange. For both purposes the party has a day, without reference to the exact hour when he himself receives the check or the notice. But, even supposing that the plaintiffs should regularly have sent the check by post on the 13th, if they meant to make use of that conveyance, still all due diligence had been used with respect to the check, as it was presented for payment as soon as it would otherwise have been by the usage of the bankers in Fleet Street, which must be considered reasonable, and consistent with the law of merchants.

Park, for the defendant, denied that the plaintiffs were at liberty to keep the check at Aylesbury till six in the evening of the 14th, when they could, without the slightest difficulty or inconvenience, have despatched it at the same hour the day before; and he contended that, if Praed & Co. had received the check by post on the 14th, they would have been bound to have presented it for payment the same day, as much as if they lived in the heart of the city. He likewise objected that the check had not been carried to Mingay, Nott, & Co. on the 15th, according to the answer given at Smith, Payne, & Co.'s, as in that case it would no doubt have been paid.

Lord Ellenborough. The holder of a check is not bound to give notice of its dishonor to the drawer for the purpose of charging the person from whom he received it. He does enough if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of its dishonor to those only against whom he seeks his remedy. The question here is whether, if the check had arrived by post on the 14th, the bankers were bound to present it for payment the same day. This must be decided by the law-merchant. I cannot hear of any arbitrary distinction between one part of the city and another. It is not competent to bankers to lay down one rule for the eastward of St. Paul's and another for the westward. They may as well fix upon St. Peter's at Rome. It is always to be considered whether, under the circumstances of the case, the check has been presented with reason-

able diligence. This is what the law-merchant requires. The rule that the moment a check is received by the post it should invariably be sent out for payment would be most inconvenient and unreasonable. In Liverpool and other great towns, different posts arrive at different hours; but it would be impossible to have clerks constantly ready to carry out all the bills and checks that may arrive in the course of the day; nor, if it were possible, is it requisite that, all other business being laid aside, parties should devote themselves to the presenting of checks. The rule to be adopted must be a rule of convenience, and it seems to me to be convenient and reasonable that checks received in the course of one day should be presented the next. Is this practice consistent with the law-merchant? It cannot alter it. Bankers would be kept in a continual fever, if they were obliged to send out a check the moment it is paid in. The arrangement mentioned by the plaintiffs' witnesses appears subservient to general convenience, and not contrary to the law-merchant, which merely requires checks to be presented with reasonable diligence.

The jury, after some deliberation, found a verdict for the plaintiffs [1]

ANDERTON v. BECK AND PEARSON.

IN THE KING'S BENCH, NOVEMBER 12, 1812.

[*Reported in* 16 *East*, 248.]

THE plaintiff declared for goods sold and delivered to the amount of £66, and upon the common money counts. The defendants pleaded the general issue; and the question turned upon whether one of two bills of exchange, which had been remitted by the post from the defendants to the plaintiff after the delivery of the goods and in satisfaction of the demand, which bill had been ultimately dishonored, was to be taken as payment, on account of the plaintiff's having made it his own by laches; for, if so, the goods were paid for, and the defendants were entitled to a verdict; and Bayley, J., was of this opinion at the trial before him at York, where the verdict passed for the defendants under his direction; but he reserved leave to move to

[1] Beeching v. ——, Holt, N. P. 315, n.; Moule v. Brown, 4 B. N. C. 266; Hare v. Henty, 10 C. B. N. S. 65; Prideaux v. Criddle, L. R. 4 Q. B. 455; Piner v. Clary, 17 B. Mon. 645 (*semble*); Miller v. Moseley, 26 La. An. 667; Moody v. Mack, 43 Mo. 210; Merchants' Bank v. Spicer, 6 Wend. 443; Gough v. Staats, 18 Wend. 549; Hooker v. Franklin, 2 Bosw. 500; Bank of New Hanover v. Renan, 76 N. Ca. 340, *accord* — ED.

set it aside and enter a verdict for the plaintiff for £30, the amount of the dishonored bill.

Richardson now moved accordingly; and after some assistance from the learned judge's report, and the finding of the jury, the facts appeared to be these. The plaintiff lived at Cullingworth, four miles from Keighley, the post-town where the defendant Beck lived. Pearson, the other defendant, lived at Steeton, where the business was carried on, four miles also from Keighley in an opposite direction from the plaintiff's residence, and in the line of the post from Bradford to Skipton. The bill in question was dated Leeds, 26th of October, 1811, and drawn by W. and E. Prest on Messrs. Boldero, Lushington, & Co. for £30, payable two months after date to J. Tyne or order, and specially indorsed by the defendants to the plaintiff. This bill became due in London on Saturday, the 28th of December; and it appeared from circumstances that the letter from the defendants enclosing this and the other bill had been received by the plaintiff at Cullingworth on the 26th, and that he acknowledged the receipt of it by a letter which was put into the post at Keighley before one o'clock on Friday the 27th, within the post hours of that day. The plaintiff had no agent in London; but, having dealings with Smith, Ellison, & Co., bankers at Lincoln, he enclosed the bill to them in a letter put into the post at Keighley on Sunday the 29th of December, and they received it either on the evening of Monday the 30th, after their bank had closed, or on the morning of Tuesday the 31st; and it was by them sent by Tuesday's post to Smith, Paine, & Co., their bankers in London, by whom it was received on Thursday morning the 2d of January (the course of the post from Lincoln to London being two days), and presented the same day for payment at Boldero & Co.'s, who had stopped payment at the close of the first of January, and by whom it was dishonored, of which immediate notice was given to the bankers at Lincoln, by them to the plaintiff by the next post, and by him to the defendants the same day. It was proved that a letter put into the Keighley post-office on Friday before one o'clock would be delivered to Beck on the Saturday, and he might have sent it to Pearson on the forenoon of that day.

Upon these facts, he contended that the plaintiff was not bound to send the bill direct to London, not having any agent there, but might, as he had done, forward it through the hands of his bankers at Lincoln, by which course it would have been impossible, even if the bill had been forwarded immediately after its receipt by the plaintiff, that it should have reached London by the day of payment. That the bill being so near due when the plaintiff received it as to make it impossible to present it on the day of payment was like a bill payable

at sight or on demand, in which case it was only incumbent on the plaintiff to present it for payment, or put it into a course of negotiation, within a reasonable time. That the bankers at Lincoln had caused no delay in forwarding it, and the bankers in London had even presented it a day sooner than by law they were bound. If the plaintiff had sent the bill to Lincoln the next day after its receipt, it would not have reached his bankers there to be in time for the London post before Sunday, on which day they would not have been bound to forward it; and, if they had kept it until Monday, it could not have reached London before Wednesday, and then, if Smith & Co. had not presented it until the next day, which would have been in due course, the bill would not have been honored: so that, if all which the law requires had been strictly observed, the case would have been the same; and therefore, even if there were laches, no damage can be said to have arisen therefrom.

Lord Ellenborough, C. J. The party who agreed to take the bill so near the time of its becoming due as to make it necessary to present it without delay might have renounced it, if he did not choose to undertake that duty, and have sent the bill back again; but, if he keeps it, he is bound to use reasonable and due diligence in presenting it. Here he has not so done: he was bound to send the bill off sooner; he might have sent it on Friday, but by delaying it until Sunday he deprived the defendants, who were parties to the bill, of the chance of its being presented at least one day sooner.

Le Blanc, J. The plaintiff is not at liberty to calculate that probably each of the parties who receive the bill in its progress to being presented will hold it in their hands to the utmost extent of time which the law allows them, in order to excuse his own delay when their despatch has exceeded his calculation.

Bayley, J. The plaintiff suffered Friday's and Saturday's post to pass without forwarding the bill; and I thought that as he had neither taken the necessary steps to get it paid, nor apprised the defendants that he meant to renounce it, therefore he had made the bill his own. The party must use due diligence, and is not at liberty to take the chances of being in time to the prejudice of other parties.

Per Curiam. *Rule refused.*[1]

[1] Freeman v. Boynton, 7 Mass. 483 (*semble*); Barker v. Parker, 6 Pick. 80 (*semble*); Haddock v. Murray, 1 N. H. 140; Field v. Mallett, 3 Hawks, 465, *contra*.

See Browning v. Armstrong, 9 Phila. 59, 62; Mason v. Pritchard, 9 Heisk. 798.

If due presentment is made at the maker's place of business, which, without the knowledge of the holder, has ceased to exist, a delay sufficient to present at his residence is excusable. Farley v. Hewson, 10 La. An. 788. — Ed.

Wantage bank. Wantage is distant from London sixty-three miles. The halves of the notes sent by the post arrived at Spooner & Attwood's in London, between ten and eleven o'clock on the morning of Monday the 11th; and the packet containing the other halves was delivered to them somewhat later. The Newbury bank stopped payment on the Monday morning, and Messrs. Barnard & Dinsdale continued to pay all notes drawn by the Newbury old bank the whole of Monday the 11th, but not afterwards; and would have paid the notes in question, if they had been presented to them at any time on the said Monday. The notes in question were sent by Spooner & Attwood to Barnard & Dinsdale for payment on Tuesday the 12th, but they were dishonored. Notice of the Newbury bank having stopped payment was communicated to the plaintiff on the evening of Monday; and he thereupon sent his son to the defendant's house, and the son communicated the fact of such stoppage to the defendant's wife at the house of the defendant, the defendant having gone to bed. The defendant, the same evening, said he would take the notes again and return them to a Mr. Lovelock, of whom he had taken them. On the Saturday following, the plaintiff's son again saw the defendant, who then refused to take the notes again, saying Mr. Lovelock had told him not to do so, as he would thereby make them his own.

W. E. Taunton, for the plaintiff. The only point is whether the plaintiff, who received these notes on the Friday morning, was guilty of any laches in not transmitting them to London by the Friday's post. If he had done so, they would have arrived at Spooner & Attwood's on the Saturday, and they might have obtained payment for them; but it is clear he was not bound to do this, and might wait till the Saturday, on which day they were sent. It is not necessary, in giving notice of the dishonor of a bill of exchange, to write by the same day's post on which it happened: if it be done on the following day, it is sufficient. Then, if so, the plaintiff has here been guilty of no laches; and this case falls within the rule laid down in Puckford *v.* Maxwell.[1]

Sir W. Owen, contra, contended that the plaintiff had made the notes his own by the laches of which he had been guilty. He was bound to have transmitted them to London by the Friday's post; for he received them early in the morning, and the post did not leave Wantage till late in the afternoon. It is laid down by Lord Mansfield in Tindal *v.* Brown[2] and Russel *v.* Langstaffe,[3] and in Bayley on Bills of Exchange, that the time limited is the next post. And the language also of Lord Ellenborough and Le Blanc, J., in Darbishire *v.* Parker, leads to the same conclusion. As to the case of Fry *v.* Hill,[4]

[1] 6 T. R. 52.
[2] Doug. 315.
[3] 1 T. R. 167.
[4] 7 Taunt. 397.

it is distinguishable upon the ground that there the bill in question was payable after sight, but here the notes were payable on demand. Besides, in the present case, one set of halves was sent by the coach, and arrived two hours later than the post on the Monday. That, therefore, was like sending them by a private hand, and brings this case within Darbishire v. Parker, at all events. Then, if so, the plaintiff is not entitled to recover.

Taunton, in reply, was stopped by the court.

ABBOTT, C. J. It is of the greatest importance to commerce that some plain and precise rule should be laid down to guide persons in all cases as to the time within which notices of the dishonor of bills must be given. That time I have always understood to be the departure of the post on the day following that in which the party receives the intelligence of the dishonor. And in that sense the passage cited from the very learned treatise on Bills of Exchange must be understood, as well as the judgment of Lord Mansfield in Tindal v. Brown. If, instead of that rule, we were to say that the party must give notice by the next practicable post, we should raise in many cases difficult questions of fact, and should, according to the peculiar local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated. In its application to the present case, the result is that the plaintiff has been guilty of no laches, and that he is entitled to our judgment. It appears that, if these notes had been transmitted direct to Newbury by the post, they would not have been paid: for they discontinued payment there on Monday morning; and, though the circumstance of one set of halves being sent by the coach caused their arrival in London two hours later, still, that being a reasonable precaution, the plaintiff had a right to send them by that conveyance. There is a difference between this case and that of a bill of exchange payable to order, for such bill may be specially indorsed, and no risk incurred by sending it then by the post. But here it would not have been so safe to have transmitted notes payable to the bearer on demand by that conveyance. Then, in addition to this, it appears that the defendant has not been in the least degree prejudiced by this mode of conveyance having been adopted. On the whole, therefore, the plaintiff is entitled to our judgment.

Judgment for plaintiff.[1]

[1] E. I. Co. v. Chitty, 2 Stra. 1175, *contra*. — ED.

JOSEPH FIELD v. EBENEZER NICKERSON.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH TERM, 1816.

[*Reported in* 13 *Massachusetts Reports*, 181.]

THE opinion[1] of the court was delivered at this term by

PARKER, C. J. The defendant in this action is charged as indorser of a promissory note, made payable to him or order, by Redfield & Beers, on demand, dated the 31st of January, 1814, and indorsed to the plaintiff on the same day. A demand upon the maker, and notice to the indorser upon non-payment, are averred in the declaration. By the facts reported it appears that no demand was made upon the promisors until the 23d of September following, which was nearly eight months after the date of the note. The jury were instructed that, to charge the indorser of a promissory note payable on demand, proof of a demand within a reasonable time after the indorsement, and immediate notice to the indorser of non-payment, are requisite; and the jury were left to decide whether, under the circumstances of this case, the demand was made within a reasonable time. They returned a verdict for the defendant, upon the ground that the delay in calling upon the makers of the note was unreasonable.

The charge to the jury is objected to by the counsel for the plaintiff, who contend that a demand at any time after making the note, with seasonable notice to the indorser, provided the statute of limitations does not oppose the recovery, will be sufficient to hold the indorser; or, at least, that, under the special circumstances proved in this case, the defendant is liable, although upon common principles the delay of the demand might have discharged him.

It is remarkable that the law relating to so familiar a species of written contract as a promissory note of hand, payable on demand, should at this late period be doubtful. But it is certain that no decisions have taken place, in England or in this country, upon the points brought into question in the present action. It is also known that opinions of respectable lawyers and others among us differ widely respecting the character and legal qualities of this contract; and that, in consequence, different practices have prevailed respecting them in different parts of the State. In the metropolis, the common opinion among merchants seems to have been that a negotiable note of hand,

[1] All that is material to an understanding of the case being contained in this opinion, the remainder of the case has been omitted. — ED.

payable on demand, and indorsed, is *a security for money*, and, like a joint and several note, may lie in the hands of the indorsee for an indefinite time; provided, when he shall demand payment, and is refused, he give seasonable notice of the refusal to the indorser. On the other hand, in some parts of the country, it has been understood that the same strictness is applicable to contracts of this kind as to notes payable on a day certain; so that, as they are by law due immediately after they are signed, they must be demanded on the same day they are given, if indorsed on that day, or immediately after the indorsement, in other cases, if the holder can conveniently make such demand.

In this state of uncertainty, it is highly necessary that the rule of law should be made known; for contracts of this kind are in daily use in all parts of the State, and the rights and duties of parties who may hold or be liable upon them ought to be precisely ascertained, if possible.

The nature of the contract must be inquired into for this purpose. Between the promisor and promisee there is no difficulty. The note is evidence of a debt or promise, and will remain obligatory upon the party signing it until lawfully discharged, unless by the statute of limitations the other party is prevented from recovering. When it is indorsed, a new party is introduced, and new qualities are attached to it. It then not only resembles an inland bill of exchange, but becomes one in fact, as to the terms on which the indorser, who may be considered the drawer, may be rendered liable. The indorser, holding written evidence of a promise by another to pay him a sum of money, which by law is assignable, by ordering the contents to be paid to a third person, virtually requests his debtor to pay the debt, of which the paper is the evidence, to that person. He has thus drawn a bill on his debtor, and the debtor is the drawee or payer of the bill; and the bill must be considered as accepted when drawn. This analogy, suggested by Lord Mansfield, has for many years been recognized; and the rules respecting bills of exchange have therefore been applied to negotiable notes actually indorsed. The analogy, however, is not perfect; for in a bill of exchange, until presentment and acceptance, there are but two parties, namely, the drawer and the payee: whereas, in indorsed notes of hand, there are three parties instantly upon the indorsement, which is to be considered the drawing; and the rule, with respect to demand of payment, must adapt itself to this difference of character.

It is said by the compilers of the law on the subject of bills and notes that a promissory note payable on demand is like a bill payable at sight; so that, as in the latter case, the holder must present his bill for acceptance within a reasonable time, in order to charge the drawer;

so, in the former, the indorsee must make demand of payment on the promisor within a reasonable time, in order to charge the indorser. And we are of opinion that this is the correct doctrine on the subject. For as, on the one hand, it can hardly be supposed that the indorser and indorsee, when they make their contract, contemplate a liability on the indorser, unless reasonable pains should be taken to procure payment of the actual debtor; so, on the other, we do not think it enters into their calculations that, as between them, the note should be considered due when drawn, in such manner as to require, in all cases, a demand the instant or the same day it may have been indorsed.

As it respects the promisor himself, he is answerable immediately to the promisee or indorsee; and he may be sued the instant he has given his signature, even without a previous demand. But the condition on which the indorser is liable is that payment shall be demanded within a reasonable time, and the earliest notice possible given of refusal. This time may therefore vary according to the circumstances and situation of the parties, to be determined by the jury, under the direction of the court. It is impossible to fix any precise period; each case depending upon its own circumstances, as in the case of a bill payable at sight, which must be presented to the drawee as soon as can conveniently be done, taking into view all the circumstances of the holder and the drawee.

There is a difference, then, in the law in relation to a note payable on demand and one payable at a day certain. The former, although due on the day when it is signed, need not of necessity, in all cases, if immediately indorsed, be demanded on that day. The latter must be demanded on the day it becomes due, without regard to circumstances, in order to charge the indorser; unless indorsed after it becomes due, or perhaps so soon before the day of payment that it would be impossible for the indorser to make the demand seasonably, in which latter case a reasonable time must be allowed to make the demand upon the promisor.

So we think that he who takes for a valuable consideration a note of hand, negotiable within a day or two after it is signed, would not be subject to the claims of the promisor in nature of set-off, on the principle that the note was overdue when indorsed, because the maker gives a credit to the note for a reasonable time after it is signed; and, if he should pay it immediately after, leaving the note assignable in the hands of the promisee, without any indorsement thereon, he would perhaps be holden to pay it again to the indorsee; for he would be considered as promising to pay the contents to any assignee who should, within a reasonable time, make demand of payment.

Whether any evidence of an understanding between the indorser and indorsee, that a note made and indorsed at the same time as a security for a debt, or to raise money, should lie without a demand, according to the rule of law, would be admissible to enlarge the liability of the indorser, we have not occasion to determine in the present case. There are cases, however, where the indorser has been held, by certain acts or by express declarations, to waive his right to insist upon a strict compliance with the rules. Such evidence would not tend to change or even explain the contract, but would proceed upon an admission of its legal effect, avoiding that effect by proof of something like a new contract of the parties.

To apply the principles now stated to the case before us. The plaintiff was bound, by the tenor of his engagement with the defendant, to make demand of payment of the note within a reasonable time from the day of its execution, as it was on the same day indorsed. He made no demand for eight months, although all the parties lived in the same town, and were in habits of business together. Was this demand made in a reasonable time? The jury have said no, and they were perfectly justified in returning that answer; and there is no doubt that a much shorter time would have been sufficient to produce the same result.

It has been suggested, however, that there is evidence in the case of a waiver, on the part of the defendant, of any advantage resulting from the negligence on the part of the plaintiff; or, at least, of an enlargement of the time within which the demand ought to be made. The fact relied upon for this is that, when the defendant was called upon to indorse the note, he was informed by Redfield & Beers that the note was not to be called for immediately.

This certainly does not amount to a waiver, either express or implied; for it does not appear that the defendant assented to any delay, he making no answer to this information. And indeed, if this evidence is to have any effect, it could not be more than to postpone the necessity of a demand for a reasonable time, of which the jury had full opportunity to judge. *Judgment according to the verdict.*[1]

[1] In the following cases, the presentment was held to be seasonable: Chartered Bank of India *v.* Dickson, L. R. 3 P. C. 574 (10 months); Lockwood *v.* Crawford, 18 Conn. 361 (2½ months); Rhodes *v.* Seymour, 36 Conn. 6; Laughlin *v.* Marshall, 19 Ill. 390 (4 days); Seaver *v.* Lincoln, 21 Pick. 267 (7 days); see Mass. Gen. Sts. c. 53, § 8; Vreeland *v.* Hyde, 2 Hall, 429 (19 months); Salmon *v.* Grosvenor, 66 Barb. 160 (2 months); Lindsey *v.* McClelland, 18 Wis. 481 (6 days).

In the following cases, the presentment was held to be too late: Martin *v.* Winslow, 2 Mas. 241 (7 months); Jerome *v.* Stebbins, 14 Cal. 457 (18 months); Keys *v.* Fenstermaker, 24 Cal. 329 (2 weeks); Mudd *v.* Harper, 1 Md. 110 (8½ years); Carlton *v.* Bailey, 27 N. H. 230 (7 months); Sice *v.* Cunningham, 1 Cow. 397 (5 months); Perry *v.* Green, 4 Harr. 61 (4 years). See Colt *v.* Barnard, *supra*, p 213, n. 6. — Ed.

SMITH v. JANES.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1838.

[*Reported in* 20 *Wendell*, 192.]

THIS was an action of assumpsit tried at the New York circuit, in June, 1838, before the Hon. Ogden Edwards, one of the circuit judges.

The plaintiff as indorsee sued the defendant, as indorser of two checks drawn by B. Rathbun on the Commercial Bank of Buffalo: one for $2,000, dated July 17, 1836, payable to the order of and indorsed by the defendant, who resides in the city of New York. It was indorsed and negotiated to the plaintiff in the city of New York, by Wood & Bogert of that place, on the 27th or 28th day of July; and the plaintiff on the same day indorsed and negotiated it to F. H. Pepoon. The check was presented at the bank, and protested for non-payment on the 4th of August, 1836. No account was given of the check between its date and the time it was negotiated to the plaintiff, nor between the time that the plaintiff put it in circulation and the day of presentment and protest. The course of the mail at that time between New York and Buffalo was three days each way. The other check was for $3,000; and the facts concerning it were the same as in relation to the $2,000 check, except it was dated July 28, 1836, was negotiated by Wood & Bogert to the plaintiff on the 29th or 30th day of that month, and by the plaintiff to Pepoon on the same day, and was presented at the bank, and protested for non-payment on the 9th of August following.

The defendant moved for a nonsuit on the following ground: that the checks were not presented in due season to charge the defendant as indorser.[1] The judge refused the motion, and the defendant excepted. Verdict for the plaintiff. The defendant moves for a new trial.

J. A. Spencer, for defendant.

R. Lockwood, for plaintiff.

BY THE COURT, BRONSON, J. In several particulars, checks are governed by the same rules that prevail in relation to inland bills of exchange payable either on demand or at a given number of days after sight. The holder can recover against the indorser only when he has used due diligence in presenting the check, and giving notice of the demand and non-payment by the bank. When the parties all reside in the same

[1] Only so much of the case is given as relates to the question of presentment. — ED.

place, the holder should present the check on the day it is received or on the following day; and, when payable at a different place from that in which it is negotiated, the check should be forwarded by mail on the same or the next succeeding day for presentment. It has been said that greater diligence is necessary in presenting checks for payment than is required in relation to bills of exchange. Gough v. Staats.[1] But I can see no good reason for making such a distinction.

The fact that one instrument is drawn upon a bank and the other upon an individual can make no difference in principle concerning the duty of the holder: what will be due diligence in the one case will, I think, be due diligence in the other. Mohawk Bank v. Broderick.[2]

As the questions are substantially the same in relation to both checks, I shall only notice that for $2,000, dated July 17, 1836. If this check was negotiated to Wood & Bogert on the day of its date, and retained by them ten or eleven days until it was passed to the plaintiff, the defendant would be discharged; but it does not appear when or to whom the check was first negotiated. It may have been transferred by the payee to Wood & Bogert on the same day they sold it to the plaintiff, or, if negotiated before that time, it may have passed through several hands before it was taken by Wood & Bogert. This is not a case where we can presume laches. The defendant is the payee of the check, and must know when and to whom it was first transferred; and the burden lies on him of making out a default in some holder of the check before it came to the hands of the plaintiff.

The course of the mail between New York and Buffalo was only three days; and, as seven or eight days elapsed between the time the plaintiff took the paper and the day it was presented to the bank for payment, the plaintiff would be chargeable with a want of due diligence, if he had not put the check in circulation. But he sold it to Pepoon on the same day it was received, and there is no proof of negligence in Pepoon or any subsequent holder of the paper. If the defendant intended to rely on any default after the check passed from the plaintiff, the burden of making out the case lay upon him. We cannot presume laches, especially in a case where the paper was in circulation for so short a period. How long a bill or check, payable on demand or at a given number of days after sight, may be kept in circulation before presentment, without discharging some of the parties, is not a settled question. Chitty on Bills, 276, ed. of 1826. It depends in a great degree on the circumstances of each particular case. In Robinson v. Ames,[3] the bill was drawn in Georgia on merchants

[1] 13 Wend. 549. [2] 13 Wend. 133. [3] 20 Johns. 146.

residing in New York; and, although seventy-five days elapsed before the presentment, it was held that the drawers were not discharged. In Gowan *v.* Jackson,[1] the bill was drawn in Antigua on merchants residing in London; and, having been put in circulation, it was held that the drawer was not discharged, although six months had elapsed before the presentment. In Aymar *v.* Beers,[2] the bill was drawn in New York on a house in Richmond, Va., at three days' sight; and it was held that the drawer was not discharged by a delay of twenty-nine days in presenting the bill for acceptance. The bill had not been put in circulation, but there were other special circumstances to show that the payee was not chargeable with negligence. In the case at bar, three days were necessary for the transmission of the check from New York to Buffalo; and it could not have been in circulation after it passed from the plaintiff more than four or five days before it was presented at the bank for payment. There is no authority for imputing laches on such a state of facts, and the judge was right in overruling the objection. *New trial denied.*[3]

SALTER *v.* BURT.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1838.

[*Reported in* 20 *Wendell*, 205.]

DEMURRER to declaration. The action was against the defendant as the indorser of a check drawn by Benjamin Rathbun, on the cashier of the Bank of Buffalo for $500, payable to the defendant's order. The check was dated August 21, 1836, but, as the count alleged, was drawn on the 9th day of that month. The 21st day of August was Sunday, and payment of the check was demanded and notice of non-payment given to the defendant on Saturday the 20th day of the month.

C. A. Mann, for the defendant.[4]

J. A. Spencer, for the plaintiff.

BY THE COURT, BRONSON, J. This check, having been postdated, was payable on the day of its date without any days of grace.[5] Mohawk

[1] 20 Johns. 176. [2] 7 Cowen, 705.

[3] See Taylor *v.* Wilson, 11 Met. 44, 52; Mohawk Bank *v.* Broderick, 13 Wend. 133; Chambers *v.* Hill, 26 Tex. 472. — ED.

[4] The arguments of counsel have been omitted. — ED.

[5] Taylor *v.* Sip, 30 N. J. 284; Mohawk Bank *v.* Broderick, 10 Wend. 304; 13 Wend. 133; Andrew *v.* Blachly, 11 Oh. St. 89; Champion *v.* Gordon, 70 Pa 474; Westminster Bank *v.* Wheaton, 4 R. I. 30, *accord*. — ED.

Bank *v.* Broderick.[1] It fell due on Sunday, and the question is, whether the demand of payment was well made on the previous Saturday, or whether it should have been made on the following Monday. When days of grace are allowable on a bill or note and the third day falls on Sunday, the bill or note is payable on the previous Saturday. The same custom of merchants which, as a general rule, allows three days of grace to the debtor, has limited that indulgence to two days in those cases where the third is not a day for the transaction of business. But when there are no days of grace, and the time for payment or performance specified in the contract falls on Sunday, the debtor may, I think, discharge his obligation on the following Monday. This question was very fully considered in Avery *v.* Stewart,[2] which was an action on a note, not negotiable, which fell due on Sunday; and the court held that a tender on Monday was a good bar to the action. I agree to the doctrine laid down by Gould, J., that Sunday cannot, for the purpose of performing a contract, be regarded as a day in law, and should, as to that purpose, be considered as stricken from the calendar. In computing the time mentioned in a contract for the doing of an act, intervening Sundays are to be counted; but, when the day for performance falls on Sunday, it is not to be taken into the computation. The check was presented before it became payable, and the demand and notice were consequently insufficient to charge the indorser. *Judgment for defendant.*[3]

WOODRUFF *v.* THE MERCHANT'S BANK OF THE CITY OF NEW YORK.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1841.

[*Reported in* 25 *Wendell*, 673.]

THIS was an action on the case, tried at the Niagara circuit in October, 1839, before the Hon. Nathan Dayton, one of the circuit judges.

The suit was brought for the omission of the notary of the bank in not duly presenting for payment and protesting a bill of exchange sent to the bank for collection, whereby the plaintiff lost his remedy upon the bill against the drawer, acceptor, and indorser. The bill is in these words: —

[1] 10 Wend. 804; 13 Id. 133.

[2] 2 Conn. 69.

[3] Sanders *v.* Ochiltree, 5 Port. (Ala.) 73; Avery *v.* Stewart, 2 Conn. 69 (*semble*); Commercial Bank *v.* Barksdale, 36 Mo. 563; Kuntz *v.* Temple, 48 Mo. 71 (*semble*); Barrett *v.* Allen, 10 Oh. 426 (*semble*), *accord.*

Doremus *v.* Burton, 5 Biss. 57; Barker *v.* Parker, 6 Pick. 80, *contra.*

See Kilgore *v.* Bulkley, 14 Conn. 362; Osborne *v.* Smith, 14 Conn. 366, n. — ED.

"$1,500 DETROIT, Nov. 15, 1838.

"Sixty days after date, pay to the order of Daniel Green, Esq., fifteen hundred dollars at the Phœnix Bank in the city of New York, value received, which place to account.

"Your obedient servant,

"L. GODARD, Detroit, Mich.

"To WM. GRISWOLD, Cashier Oakland County Bank, Mich."

It was accepted in these words written across its face: "Accepted. Wm. H. Griswold, cashier," and was indorsed by the payee. The signatures of the drawer, acceptor, and indorser, were duly proved; and it was admitted that on the 3d day of January, 1839, the Merchant's Bank received the bill for collection. It appeared in evidence that the bill was not presented on the 17th day of January, the third day of grace; but was presented on the 14th day of January, and on that day protested, and notices of non-payment forwarded. The counsel for the defendants insisted that an instrument in the above form was a bank check or draft, and that according to the usage and custom of merchants in the city of New York it fell due at the expiration of sixty days, and was not entitled to the days of grace allowed on promissory notes and bills of exchange. This usage was proved by one president and four cashiers of banks in the city of New York, and by a distinguished broker in that city: which evidence was objected to by the counsel for the plaintiff, but the objection was overruled and the evidence received, to which decision the counsel for the plaintiff excepted. The judge thereupon charged the jury that the plaintiff was not entitled to recover; and the jury under his direction found a verdict for the defendants, which the plaintiff moves to set aside The cause was submitted on written arguments, by

J. L. Curtenius, for the plaintiff.

B. W. Bonney, for the defendants.

BY THE COURT, NELSON, C. J. Whether the instrument in question is to be regarded as drawn upon the Oakland County Bank or upon Wm. H. Griswold individually, it is quite clear the witnesses testifying to the commercial usage respecting such paper in the city of New York misapprehend its established character. They must have assumed it to be in effect, if not in form, a bank check or draft, and applied to it the usage in respect to that class of paper, instead of which it contains every distinguishing characteristic of an ordinary bill of exchange. Chitty on Bills, 50 *a*; Chitty, Jr., 8. It is essential to a check *eo nomine*, or bank draft, that it be payable to bearer, and on demand, Chitty on Bills, 52, 322; Chitty, Jr, 24, 26; 21 Wend. 337; and then days of grace do not attach, any more than to bills or notes payable on demand.

The effect of the proof of usage, as given in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York. We need scarcely add, even if the witnesses were not mistaken, and the usage prevails there as testified to, it cannot be allowed to control the settled and acknowledged law of the State in respect to this description of paper.[1]

New trial granted; costs to abide event.[2]

NATHANIEL WOOD *v.* MICHAEL MULLEN AND ANOTHER.

IN THE SUPREME COURT, LOUISIANA, JANUARY, 1843.

[*Reported in* 3 *Robinson*, 395.]

APPEAL from the District Court of the First District, *Buchanan*, J.

T. Slidell, for the plaintiff.

A. Hennen, for the appellants.

MARTIN, J. The defendants are appellants from a judgment on their promissory note. They resisted the claim on an allegation that the plaintiff was not the owner of the note sued upon, but that it is the property of Taylor & Brothers, against whom the defendants have a demand, which they are entitled to plead in compensation. The defendants did not establish their plea; but they contend that judgment ought to have been given against the plaintiff, because he has not complied with the prerequisite of the law, by making a demand at the place indicated on the face of the note for its payment, on or after its maturity. They state that the note bears date the 29th of August, 1841, and was made payable at the Phœnix Bank, six months after date. The petition alleges no demand except one, which was made

[1] But evidence of a local usage, by which four days of grace were allowed on paper discounted by the banks in the District of Columbia, has been deemed admissible. Renner *v.* Bank of Columbia, 9 Wheat. 581; Mills *v.* Bank of United States, 11 Wheat. 431; Bank of Washington *v.* Triplett, 1 Pet. 25; Cookendorfer *v.* Preston, 4 How. 317; Adams *v.* Otterback, 15 How. 539; Bank of Columbia *v.* Magruder, 6 Har. & J. 172. See also Fowler *v.* Brantly, 14 Pet. 318; Kilgore *v.* Bulkley, 14 Conn. 362; Citizens' Bank *v.* Cutter, 3 Pick. 414; Perkins *v.* Franklin Bank, 21 Pick. 483; Mechanics' Bank *v.* Merchants' Bank, 6 Met. 13; Jackson *v.* Henderson, 3 Leigh, 196. — ED.

[2] Affirmed in 6 Hill, 174; Henderson *v.* Pope, 39 Ga. 361; Bank of Georgia *v.* Henderson, 46 Ga. 487; Culter *v.* Reynolds, 64 Ill. 321; Griffin *v.* Kemp, 46 Ind. 172 (*semble*); Champion *v.* Gordon, 70 Pa. 474 (*semble*), *accord*.

Westminster Bank *v.* Wheaton, 4 R. I. 30, *contra*.

See Herring *v.* Kesee, 1 So. L. Rev. 613.

Conf. Commercial Bank *v.* Varnum, 49 N. Y. 269. — ED.

on the second day of March following. The note, being due six months after the 29th of August, was so on the 28th of February following, and did not become payable till after the expiration of the three days of grace, to wit, on the 3d of March. This mode of calculating the day of payment of a note is according to the jurisprudence of this court, as settled in the case of Wagner *et al. v.* Kenner;[1] and, according to the same jurisprudence, a demand of payment at the place indicated in the note on or after its maturity is a prerequisite to the right of recovery.

The certificate of the judge that the record contains all the evidence is sufficient, independently of that of the clerk. We therefore considered it useless to inquire whether the latter can properly certify to that effect, when he has not been called upon to take down the evidence on the trial.

It is therefore ordered that the judgment be reversed, and that ours be for the defendants, as in case of nonsuit, with costs in both courts.[2]

[1] 2 Rob. 120.

[2] Cockell *v.* Gray, 3 B. & B. 187; Wagner *v.* Kenner, 2 Rob. (La.) 120; Ammidown *v.* Woodman, 31 Me. 580; Leffingwell *v.* White, 1 John. Cas. 99; Roehner *v.* Knickerbocker Co., 68 N. Y. 160; McMurchey *v.* Robinson, 10 Oh. 496; Thomas *v.* Shoemaker, 6 Watts & S. 179; Byles, Bills (11th ed.), 204, *accord*.

Craft *v.* State Bank, 7 Ind. 219, *contra*.

Conf. Kohler *v.* Montgomery, 17 Ind. 220.

In Wagner *v.* Kenner, *supra*, the court cited, p. 128, with approval the following extract from Dalloz, Jurisprudence Générale, Vol. 6, § 4, tit. Effets de Commerce: "The computation of bills or notes drawn one or more months from date is made according to the Gregorian calendar, that is to say, from the day of the month it bears date to the corresponding day of the month of its maturity, without any attention to long and short months. For instance, a note drawn on the 28th, 29th, 30th, or 31st of January, and due a month from date, will be due on the 28th of February, if the year be not bissextile, because the month of February has no other corresponding day; those drawn on the 28th or 29th of February and due one month from date will be due on the 28th or 29th of March, because the corresponding days are found in the month of March. A bill drawn the 31st of March, and due one month from date, will be due on the 30th of April; and, on the other hand, one drawn on the 30th of April will be payable on the 30th of May, and not the 31st." — Ed.

BOWEN AND OTHERS v. NEWELL, IMPLEADED WITH OTHERS

IN THE COURT OF APPEALS, NEW YORK, MARCH, 1853.

[*Reported in* 4 *Selden*, 190.]

JOHNSON, J., delivered the opinion of the court.[1] The main question in this case is whether an instrument in the following form is or is not entitled to days of grace: —

"NEW YORK, Oct. 5, 1849.

"Cashier of Thomson Bank, pay Zenas Newell or order two thousand dollars on the 12th inst.

(Signed) "B. SEARLS & Co.

(Indorsed) "ZENAS NEWELL."

The Thomson Bank is in Connecticut. Whether days of grace are to be allowed upon this instrument does not depend upon its being drawn upon a bank, for in that case the rule would be general, and deny grace to all bills drawn upon banks. The contrary was adjudged in respect to a bill drawn at sixty days after date in Woodruff *v.* Merchants' Bank. I do not see what difference in the legal rights of the parties it would have made, if the check in suit had been worded "seven days after date" instead of saying "on the 12th inst.;" and yet, if it had borne those words, there would have been no possible ground for distinguishing the case from Woodruff *v.* The Merchants' Bank. No case has been cited to the contrary, except in the matter of Brown.[2] In that case, however, Judge Story puts his opinion upon a variety of grounds beside this, and upon this his opinion does not seem to me capable of being sustained. He says, "The argument pressed is that checks are always payable on demand, and that, when payable at a future time, they become inland bills;" and, after saying that "a check is not less a check for being postdated" (with which Mohawk Bank *v.* Broderick agrees[3]), he adds, "It is commonly, though not always, payable to the bearer; but I conceive it to be still a check, if drawn on a bank or banker, although payable to a particular party only by name, or to him or his order. It is usually also made payable on demand, though I am not aware that this is an essential requisite. The distinguishing characteristics of checks as contradistinguished from bills of exchange are (as it seems to me) that they

[1] All that is material to the understanding of this case being contained in this opinion, the rest of the case has been omitted. — ED.

[2] 2 Story, 502.

[3] 13 Wend. 133; s. c. 10 W. 304.

are always drawn upon a bank or banker; that they are payable immediately on presentment, without the allowance of any days of grace; and that they are never presentable for acceptance, but only for payment." Of all these characteristics, the only one that can serve any purpose in determining whether any particular instrument is a check or a bill of exchange is that it is drawn upon a bank or banker. The others may or may not be legal qualities which belong to checks after they are ascertained to be checks, but do not aid in determining their character. The citations from Kent's Commentaries, in the same opinion, are merely to the same effect; and the case on this branch of it is, after all, put upon the statement that, by the usage of banks and the understanding of parties, such instruments are always treated as payable on the very day designated as the day of payment. We have however seen by the law of this State, as expounded in the court for the correction of errors, that, conceding any instrument to be a check which is drawn upon a bank, it does not therefore possess the quality of being payable on the day when, by its face, payment is to be made, but that, unless it be payable on demand, it has days of grace.

The usage which was proved in this case ought to have been excluded, in accordance with Woodruff *v.* The Merchants' Bank. The judgment of the superior court and of the referee should be reversed, and a new trial ordered, with costs to abide the event.

Judgment reversed, and new trial ordered.[1]

JAMES WHITE, Administrator, *v.* ELIJAH B. STODDARD and Another.

In the Supreme Judicial Court, Massachusetts, October Term, 1858.

[*Reported in* 11 *Gray*, 258.]

Action of contract against the indorsers of a negotiable promissory note, dated Dec. 11, 1856, and payable in one year. Trial before

[1] Minturn *v.* Fisher, 4 Cal. 35; Ivory *v.* Bank of Mo., 36 Mo. 475; Morrison *v.* Bailey, 5 Oh. St. 13 (but see Andrew *v.* Blachly, 11 Oh. St. 89); Bank of New Hanover *v.* Kenan, 76 N. Ca. 340; Brown *v.* Lusk, 4 Yerg. 210, *accord*.

In re Brown, 2 Story, 502; Taylor *v.* Wilson, 11 Met. 44, 52 (*semble*); Osborne *v.* Smith, 14 Conn. 366, n.; Lawson *v.* Richards, 6 Phil. R. 179; Champion *v* Gordon, 70 Pa. 474; Westminster Bank *v.* Wheaton, 4 R. I. 30 (*semble*), *contra*.

See Ransom *v.* Wheeler, 12 Abb. Pr. 189. — Ed.

Merrick, J., and verdict for the plaintiff, subject to the opinion of the court upon these facts: —

Adams P. Barnes took the note for valuable consideration soon after it was made, and died on the 15th of November, 1857. William Greenleaf, the executor named in his will, found the note among his papers on the 11th of December, 1857, and filed it, and on the 31st of December requested the defendants to waive their right of demand and notice, which they declined to do. On the 5th of January, 1858, the will of Barnes was admitted to probate, and on the 13th Greenleaf renounced the trust of executor, having never given bonds. On the 19th, the plaintiff was appointed administrator with the will annexed, gave bond as required by law, and received the papers of the deceased, among which, on the 26th of January, he found the note, and the next day demanded payment of the maker, which was refused, and notice given to the defendants.

F. H. Dewey & E. B. Stoddard, for the defendants. The demand upon the maker was not seasonably made. The death of the holder and want of administration do not excuse non-presentment. Price *v.* Young.[1] Story on Notes, §§ 201, 203, 241; Story on Bills, §§ 112, 203, 227, 230, 346. If presentment at maturity is prevented by death or inevitable accident, it should be made at the earliest moment after some one is authorized to act. Losing or mislaying a note is no excuse for non-presentment. Story on Notes, §§ 250, 290. In this case, the executor named in the will found the note three days before it became due, and filed it, thus leaving it where any representative of the holder might find it: he recognized his duty with regard to it by asking the indorsers to waive demand and notice, and did not decline the trust until some days after the will had been admitted to probate. The administrator made no demand until eight days after he had received the note, as he might have known by the slightest examination of the papers of the estate. When he found it, he did not present it until the next day, nor notify the indorsers until the day after. They are discharged by his laches.

D. Foster, for the plaintiff. It is a general principle of the law merchant that, whenever the presentment for payment or notice of non-payment of a promissory note becomes impossible without fault of the owner, the indorsers remain liable, provided presentment is made and notice is given within a reasonable time after the obstacle is removed. This rule applies where the holder has died, and there is no executor or administrator appointed or qualified to act at the maturity of the note. Molloy, bk. 2, c. 10, § 34; Bac. Ab. Merchant, M. 7; Cunningham on Bills, sect. 7, § 3. Beawes, Lex Merc., Bills of Ex-

[1] 1 McCord, 339.

change, 150; 3 Kent Com. (6th ed.) 109; Story on Notes, §§ 205, 206, 257–263, 337, 355, 368; Byles on Bills (4th Am. ed.), 41, 236; 1 Parsons on Con. 226; Rosc. Ev. 147; Pothier, Traité du Contrat de Change, 144; 2 Pardessus Droit Com. 422 *et seq.*; Hilton *v.* Shepherd,[1] Patience *v.* Townley, Creamer *v.* Perry,[2] Freeman *v.* Boynton,[3] Farnum *v.* Fowle,[4] Barker *v.* Parker,[5] Rand *v.* Hubbard,[6] Tunno *v.* Lague,[7] Schofield *v.* Bayard,[8] Hopkirk *v.* Page,[9] Aborn *v.* Bosworth,[10] Windham Bank *v.* Norton,[11] Price *v.* Young.[12] By the preponderance of authorities, there is no distinction between a case of intestacy and one in which there is an executor who has not qualified. If there is any such distinction in England, there is none under our statutes. Rev. Sts. c. 63, § 2. At all events, it is not applicable to this case, in which the executor never qualified, but wholly renounced the trust.

Merrick, J. Greenleaf having refused to act as executor, there was no person, until the appointment of the plaintiff as administrator of the estate of Barnes, who could lawfully demand payment of the maker or receive the amount due upon the note. When the holder of a negotiable promissory note has died, and no executor or administrator has been appointed and qualified to act at its maturity, the indorsers remain liable, and will continue to be liable, if presentment is made to the maker in a reasonable time after the due appointment and qualification of an executor or administrator, and notice of the dishonor of the note is seasonably thereafterwards given to them. An administrator must be allowed a reasonable time to search for and examine the papers and evidences of the property of the deceased, before he can be required to act in relation to any of them. From the facts reported, there appears to have been no negligence or inattention or improper delay in the performance of his duty on the part of the plaintiff, after a letter of administration was granted to him, but that he proceeded in all respects with reasonable promptitude and diligence. He first found and saw the note on the 26th of January, which was within one week after his appointment, and on the next day he presented it to the maker for payment. This, within the meaning of the rule of law upon that subject, was a presentment in a reasonable time. The indorsers were notified of the non-payment and dishonor of the note on the day then next following. That notice was sufficient, and given in sufficient season to make their liability thenceforward absolute and unconditional; and there must accordingly be *Judgment on the verdict.*[13]

[1] 6 East, 14, n. [2] 17 Pick. 335. [3] 7 Mass. 486.
[4] 12 Mass. 92 [5] 6 Pick. 80. [6] 4 Met. 252.
[7] 2 Johns. Cas. 1. [8] 3 Wend. 488. [9] 2 Brock. 20.
[10] 1 R. I. 401. [11] 22 Conn. 213. [12] 1 McCord, 339.
[13] Jex *v.* Tureaud, 19 La. An. 64; Duggan *v.* King, Rice, 239, *accord.* — Ed.

MERRITT v. TODD.

IN THE COURT OF APPEALS, NEW YORK, MARCH, 1861.

[*Reported in* 23 *New York Reports*, 28.]

APPEAL from the Supreme Court. Upon the trial before Mr. Justice Emott, without jury, which was waived, he found these facts: On the 5th day of May, 1852, Obadiah Peck borrowed of the plaintiff $2,000, and made his promissory note therefor on that day, payable on demand, with interest, to the order of Rufus L. Todd, who indorsed the note at the time it was made, with knowledge of the facts, and for the accommodation of Peck. The interest was paid on the note by Peck for three years (but whether annually or otherwise did not appear). Peck became insolvent after the making of the note. On the 24th day of December, 1855, payment of the note was demanded of Peck, and refused, and notice thereof given to the indorser. On these facts, the judge found, as a conclusion of law, that the demand of payment was not made within a reasonable time, and that the indorser was discharged. He gave judgment dismissing the complaint. The judgment was affirmed at general term in the second district, and the plaintiff appealed therefrom to this court.

E. W. Chester, for the appellant.

Amasa J. Parker, for the respondent.

COMSTOCK, C. J. There is a most inconvenient uncertainty as to the rule of law applicable to the question in this case, — an uncertainty not inherent in the subject, but which arises from the want of harmony, and still more, I think, from the want of an intelligible principle in many of the adjudged cases. The difficulty is not inherent, because there are two opposing principles, either of which would furnish a rule sufficiently clear and precise for the determination of this and all similar controversies; but the greater number of decided cases, while following neither one of those theories, do not suggest any other having the elements of certainty which belong to a rule of law.

In the light of one of these principles, the contract is interpreted according to its terms; that is to say, a promissory note, payable on demand, with interest, and indorsed, is regarded as a continuing security: so that, on the one side, the maker is not deemed in default until the money is actually demanded; while, on the other, the holder may make the demand when he pleases, and is not chargeable with neglect if he does not make it within any particular time. In this view, which gives the most obvious interpretation to the language of the contract, no dishonor attaches to such a note until payment is re-

quired and refused; and the indorser is held, if notice of the refusal is given to him with due diligence. And this is the doctrine of the English courts. In Brooks v. Mitchell, a note of £1,000, payable on demand, with interest, had been indorsed and transferred several years after its date; and the question was, whether the indorsee took it subject to equities between prior parties. The court observed: "If a promissory note, payable on demand, is, after a certain time, to be treated as overdue, although payment has not been demanded, it is no longer a negotiable instrument. But a promissory note, payable on demand, is intended to be a continuing security. It is quite unlike the case of a check, which is intended to be presented speedily.' Such was also the doctrine laid down in Barough v. White.[1]

The alternative, or opposing rule, is that the holder of such a note as we are speaking of must, if he wishes to charge the indorser, make his demand of the maker without delay, or, in the language of the law-merchant, within a reasonable time. This is a rule sufficiently exact, if we give to the phrase "reasonable time" its proper legal signification. In the sense of the law relating to bills and notes, these words exclude all delays, except such as necessity or convenience require. They call simply for due diligence in performing the act which is to be done. They have no reference to what may be a convenient time for the maker of the principal obligation to pay his debt; but they refer solely to the time within which the holder can conveniently make the necessary presentment or demand, or give the required notice. What is reasonable time or due diligence is settled in most circumstances by legal rules capable of a definite application to questions as they arise. In the formation of these rules, a supposed credit, or indulgence toward the debtor, has never entered as a circumstance or element to be considered. Thus, in the language of the books, notice of the dishonor of a bill or note must be given to the drawer or indorser within a reasonable time. But, where the parties reside in the same town or city, this reasonable time is held not to extend beyond the next day after the presentment for acceptance or payment. Story on Notes, §§ 319, 320. Where they reside in different towns or cities, and the notice is sent by post, it must be mailed early enough for transmission on the day following the dishonor. So, in the cases where presentment for acceptance is necessary, as in the instance of a bill payable at so many days after sight, or according to some authorities payable at sight, the presentment must be made within a reasonable period: it need not be made on the very day when the bill is dated, or when it comes to the hands of the holder; but the bill cannot be held for a single hour as a time instrument or obligation. It

[1] 4 B. & C. 325.

must be presented as soon as the circumstances will reasonably permit, reference being had to the distance of the parties from each other, to sickness and other casualties; but no time is allowed for the convenience of the person on whom the bill is drawn. The notion of a credit or indulgence due to him, in respect to the funds in his hands, does not enter at all into the calculation. These are well-settled rules of the commercial law; and if promissory notes, payable on demand, in all cases fall within them, there will very rarely be any difficulty in determining whether such a note has been demanded in due season to charge the indorser. The demand must, according to these rules, be always made within a reasonable time, that is to say, as soon as the holder can make it; allowing, for his convenience, the next day after it comes to his hands, if the parties reside in the same town, or longer, according to their distance from each, and other circumstances which may reasonably prevent the prompt performance of the act.

We have these two principles, directly antagonistic to each other, by one or the other of which questions like the one before us ought to be determined. We say this, because there is no intermediate ground to stand upon. A note payable on demand is either a continuing security, upon which a demand may be made in season at any time, or it is not; and then a demand must be made immediately, that is to say, on the next day after the holder receives the note, or within such additional time only as the circumstances of distance, &c., may require. If we depart from these rules, and attempt to find one lying somewhere between them, we are lost in uncertainty, and the community will never know how to transact business of this nature in safety. If we admit the theory that, by taking a demand note, some term of credit, of longer or shorter duration, is given to the maker, but yet a term not to be ascertained by an actual presentment and demand, then a question for ever arises, What is that period of credit? And this is a question absolutely incapable of solution according to any principle intelligible in itself or capable of application to the dealings of men. If we say that such a note is not in dishonor for ten days, where the parties live near to each other, and that it need not be demanded within that time, what reason can be given for saying that it must be demanded within ten months? It seems to me plain that such obligations are due immediately for the purpose of charging an indorser, or letting in a defence against an indorsee which existed between the original parties, or else that they are not due for those purposes until the money is called for.

Some authority can be cited in favor of both these opposing principles. As I have said, a note, payable on demand, with interest, is regarded in England as a continuing security, imposing no duty of

presentment within any particular time. In this country, one of the earliest cases on the subject which I have noticed is that of Field v. Nickerson, which sustains the opposite doctrine. In that case, the note was payable on demand, with interest, and indorsed by the defendant for the accommodation of the maker. No demand was made until eight months after the date of the instrument. The question was, whether the indorsee was discharged by that delay. Chief Justice Parker, in giving the opinion of the court, thought that such notes must be demanded within a reasonable time, in the sense of the commercial law; that is, as soon as the act could be conveniently done. He observed, in substance, that such a note, in respect to the duty of presentment, was like a draft payable at sight; and, if he was correct in that view of the question, the conclusion was plain, because in regard to sight drafts the rule is well settled. The holder must present them with due diligence, having no reference to the convenience of the drawee.

But a considerable number of later cases might be referred to, resting on less definite grounds, and tending very much to obscure the general question. In Martin v. Winslow [1] there was a delay of seven months in presenting a note payable on demand, and it was held by Judge Story that the indorser was discharged; but, in holding this, the doctrine was not asserted that immediate diligence must be exercised in making the demand, nor was it suggested that, if the delay had been a month or a week shorter, the indorser would not have been held. On the other hand, the Supreme Court of Massachusetts, in Seaver v. Lincoln,[2] held that a demand made on the seventh day after its date upon a note payable on demand, with interest, was in due season to charge the indorser. The holder resided eighteen miles from the maker and six from the indorser; but there was no suggestion or pretence that the delay was excused by any circumstances of that character, or that it could be accounted for at all by any convenience or necessity of the holder. Nor does the case assert, on the other hand, that such securities are of a continuing character, according to the doctrine of the English courts. In Ranger v. Carey,[3] the note was transferred by the payee one month after it was given; and the court held that it was not to be deemed as due and dishonored so as to be subject to a defence which the maker had against the original holder. In the following year, the contrary proposition was determined by the same court, in reference to a similar note transferred eight months after its date. The American Bank v. Jenness.[4] No reason was

[1] 2 Mason, 241. 1 Metc. 369.
[2] 21 Pick. 267.
[4] 2 Metc. 288.

given for either decision, except that, in one case, the time was only one month, and in the other eight.

The course of decision in our own State is not more satisfactory The earliest case is that of Furman v. Haskin,[1] where it appeared that eighteen months had elapsed before the transfer of the note, and this lapse of time was held sufficient to admit a defence of the maker. It does not appear that the note was on interest. In Sice v. Cunningham,[2] the question was, whether the indorser was discharged by a delay of five months in demanding payment of the note from the maker. The court held that he was discharged; but whether a delay for any shorter period would have the same effect was not suggested, nor was any rule laid down for the determination of questions of this character. In the later case of Wethey v. Andrews,[3] the note was payable on demand, with interest; and it was transferred three or four weeks after its date. It was held not dishonored, so as to let in a defence of a want of consideration. In this case, the circumstance that the security was on interest seems to have been treated for the first time as quite material to the question. Judge Cowen observed that "it would be contrary to the general course of business to demand payment short of some proper point for computing interest, such as a quarter, half a year, a year," &c.; and he goes on to cite, with apparent approbation, the doctrine of the English courts, that such securities are of a continuing character, and cannot be considered as dishonored until payment is demanded and refused. In Vreland v. Hyde,[4] it was decided by the Superior Court of the city of New York that such a note, I mean one on demand with interest, could be demanded, and the indorser charged, nineteen months after its date. I do not think that the reasons assigned for that decision were very carefully considered, although the decision itself is in accordance with the conclusion to which I have arrived in the present case.

We are satisfied that questions of this kind ought to be determined according to one of the two rules which have been mentioned; in other words, that the demand may be made in due season at any time so as to charge the indorser, or else that he is discharged, unless it be made with due diligence, in the general sense of the commercial law. Between these alternatives, we are to select the one which will best harmonize with the language of the contract and the intention of the parties. A demand note may be payable with or without interest. If the security be not on interest, it may be a fair exposition of the contract to hold that no time of credit is contemplated by the indorser, and that the demand should be made as quickly as the law will require

[1] 2 Caines, 369.
[2] 1 Cow. 397.
[3] 3 Hill, 582.
[4] 2 Hall, 429.

upon a check or sight-draft. Such a note payable at a bank where the maker keeps his funds will perform essentially the office of a check, imposing the duty of early presentment in order to hold the collateral parties. Drafts or checks are, however, almost universally used in such transactions. But, whatever may be the rule where the security is not on interest, we think that a note payable on demand with interest is a continuing security, from which none of the parties are discharged until it is dishonored by an actual presentment and a refusal to pay. The loan or forbearance of money may be for a definite or an indefinite time. If the parties declare in the written instrument, which is the only evidence of their agreement, that the money shall be paid on call, with interest in the mean time, a productive investment of the sum for some period of time is plainly intended. What, then, is that period? The only answer which can be given is that it is indefinite or indeterminate, and ascertainable only by an actual call for the money; and, if that be the meaning of the principal parties, the indorser must be deemed to lend his name to the contract with the same intention. The only rational alternative is that the payee or holder of such a note must demand its payment on the same day, or the day after, he receives it, unless some necessity or convenience of his own will excuse a longer delay; and he must give immediate notice of the refusal to the indorser. But a demand thus quickly made would probably, in every case, violate the actual intention of the parties; and it ought not therefore to be required as a rule of law for any collateral purpose. It should not be required in order to charge an indorser, if the act would not be consistent with the fair interpretation of the principal contract. In short, we see no good reason why a note, like the one now in question, should not be construed precisely according to its terms; and, if we follow that construction, such instruments are not dishonored by the mere effluxion of time which is provided for in their own language. It may be well to observe that the present question is not identical with the one which arises where, after the transfer of such a note, the maker seeks to introduce a defence existing against the first holder. The lapse of time, or the non-payment of interest after the regular period or periods for such payment have passed, may be sufficient to put the purchaser on inquiry, or to justify a presumption that the instrument was actually dishonored before the transfer. It might well be true, in such a case, that a demand had been actually made and notice given to the first indorser so as to charge him, while at the same time the maker would be let in to defend, if he had any defence. Questions of charging the indorser, therefore, and questions of allowing an original defence to the maker, may depend on very different considerations.

On the whole, we are of opinion that, in the case before us, the indorser was duly charged by the actual demand upon the maker of the note and by the notice of his refusal to pay. In arriving at this conclusion, we are aware that we go somewhat beyond many adjudged cases, and that the decision is in conflict with some of them. Yet we go no further than the principle of other cases fairly leads us; and we have the satisfaction of believing that the rule we lay down is not only just in itself and tends to uphold dealings according to their actual intention, but that it will promote certainty in a branch of the law where certainty is eminently desirable.

The judgments of the general and special terms of the Supreme Courts must be reversed, and a new trial granted, with costs to abide the event.

SELDEN, DENIO, DAVIES, MASON, and JAMES, JJ., concurred.[1]

PLATO v. REYNOLDS AND ANOTHER.

IN THE COURT OF APPEALS, NEW YORK, SEPTEMBER, 1863.

[*Reported in 27 New York Reports*, 586.]

APPEAL from the Supreme Court. Action on a bill of exchange for $3,627.10, drawn by Reynolds & Wagner, the defendants, on Peter Uhler, payable to the order of Miles & Bartlett, one day after its date, Sept. 8, 1856. The trial was before a referee.[2]

The referee ordered judgment for the plaintiff, which was affirmed at general term, and the defendants appealed to this court. The questions raised, and such other facts as are material, sufficiently appear in the following opinions.

B. W. Bonney, for the appellants.

Amasa J. Parker, for the respondent.

WRIGHT, J. The bill which was drawn, payable one day after date, was presented to the drawee for acceptance on the day it matured: acceptance was refused, and it was protested for non-acceptance. The certificate of the notary states that on the same day (12th September) he forwarded written notice, by mail, to the drawers (the defendants) and indorsers (Miles & Bartlett), informing them of the non-accept-

[1] The dissenting opinion of Hoyt, J., with whom Lott, J., concurred, has been omitted. — ED.

Pardee v. Fish, 60 N. Y. 265, *accord*. — ED.

[2] Only so much of the case is given as relates to the question of presentment. The judgment was reversed upon a point of evidence. — ED.

ance thereof. It was also proved that on the following day the payees (Miles & Bartlett) received the original draft, with notices of protest for themselves and the defendants, and caused such notice to be served on the latter that day. The drawee also informed one of the defendants on the 12th September, at the office of the payees, that he had not accepted or paid the draft. In view of this proof, I think the referee did not err in refusing to dismiss the complaint, and in deciding that the bill was duly presented and protested, and that due notice was given to the defendants to charge them as drawers. The defendants claim that the draft being due when presented, and demand made by the notary, it was then too late to present it for acceptance; and presentment for acceptance of a bill which is due is not sufficient to charge the drawers. But it is well settled that the holder of a bill, payable a specified length of time after date or on a day certain, need not, for the purpose of charging the drawers and indorsers, present it for acceptance until it becomes due and payable. It may be presented before or at the time of its maturity. Edwards on Bills, 387; Story on Bills, § 231; Allen *v.* Suydam.[1]

All the judges, except MARVIN, J.,[2] agreed that a refusal to accept on the day payment is due is equivalent to a refusal to pay, and renders a demand of payment unnecessary. On the question of evidence, all the judges concurred.

Judgment reversed, and new trial ordered.

[1] 20 Wend. 321; s. c. 17 Wend. 368.

[2] The following extract contains the substance of the dissenting opinion of Marvin, J.: "In the absence of any controlling authority, we must examine the question upon principle. And the question is not simply whether a bill of exchange may be presented to the drawee for acceptance at the time it is due, but it also includes the question whether the drawers will be liable upon the refusal to accept at that time and notice of such refusal, no demand of payment being made.

"As we have seen, it is not necessary as to the liability of the drawer that the bill should be presented for acceptance. If it is duly presented for payment, and payment is refused, and the drawer has notice, he remains liable. If duly presented for acceptance, and there is a refusal to accept, notice must be given to the drawer, and the holder may at once resort to him by action, though the time for the payment of the bill has not arrived. It seems to me, however, that, if the holder waits until the bill is due before presenting it for acceptance, he should then demand payment, and, if payment is refused, he should give notice of those facts to the drawer, and that, unless he does so, the drawer will be discharged. The time having arrived when the holder is entitled to payment, and not having previously required acceptance, the duty is devolved upon him of demanding payment of the drawer, and, in case of refusal to pay, of giving notice of such demand and refusal. Why require acceptance, when, if the bill is accepted, he will be obliged at once to demand payment, in case he intends to preserve the liability of the drawer? I can see that a holder of a bill may be willing to discharge the drawer, and look to the acceptor alone and give him indulgence, and in such a case he may present the bill for accept-

THE NATIONAL NEWARK BANKING COMPANY *v.* THE SECOND NATIONAL BANK OF ERIE.

IN THE SUPREME COURT, PENNSYLVANIA, NOVEMBER 24, 1869.

[*Reported in* 63 *Pennsylvania Reports*, 404.]

THE opinion[1] of the court was delivered January 3d, 1870, by READ, J. The court, assuming that there were no disputed facts in this case, undertook to decide the question whether the presentment of the bill or draft which was the subject of this suit was made to the drawees in New York within a reasonable time. Their decision was that the time taken was unreasonable, and that the defendants were not liable to pay the amount of their draft.

A. Judson, who was acting as the agent of T. H. Hubbard in the collection of money claimed by him, by way of damages, from different persons for the unlawful use or infringement of a photographic patent, on Saturday, 17th March, 1866, purchased the following draft from the defendants: —

"SECOND NATIONAL BANK OF ERIE.

"Erie, Pa., March 17th, 1866.

"Pay to the order of A. Judson, Esq., three hundred dollars.

(Signed) "W. C. CURRY, *Cashier.*

"To CULVER, PENN, & Co., New York."

Mr. Judson was a resident of Newark, New Jersey, and his business took him through the oil region. He stayed at Erie over Sunday, and on Monday the 19th of March left Erie, and travelled as far as Oil City that day, stopping at Meadville and Franklin on his way; he stopped at Oil City on Monday night, and on Tuesday morning, the 20th, left for Pithole, and, reaching that place Tuesday evening, stayed there Tuesday night; on Wednesday, he went to Titusville, where he

ance on the day it is due; and, if accepted, the acceptor will be liable, and, as to him, no demand of payment need be made. The undertaking of the drawer is that, in case the bill is duly presented for acceptance, the drawee will accept, and that he will pay the bill upon due presentment for payment, whether it has been presented for acceptance or not; and, if the drawee refuses to accept upon due presentment for such purpose, or refuses to pay, in case payment is demanded at the maturity of the bill, and notice of such refusal is given, then that the drawer will pay. His liability is conditional. In my opinion, if the holder neglects to require acceptance until the bill is due, in the language of Kent, his right to require acceptance becomes merged in or confounded with the right to demand payment."

[1] All that is material to an understanding of the case being contained in this opinion, the remainder of the case has been omitted. — ED.

stayed Wednesday; on Thursday, he went to Corry, and stayed there Thursday night; on Friday the 23d of March, he left Corry, and travelled continually night and day, until he arrived at Newark, his place of residence, on Sunday, March 25th. Until he reached Corry, he travelled partly by cars and partly by stage, making collections on his route at different places where he stopped. On Monday the 26th of March, he remained at home, very much fatigued and overcome by the journey. On Tuesday the 27th of March, he transferred the bill to the plaintiffs, receiving from them in money the full face of the bill. It was sent by them by mail to their correspondent, the Merchants' National Bank of New York, and was on the 28th of March presented by them for payment to the drawees, and payment refused, they having failed the day before.

There is no allegation that the plaintiffs, so far as regards themselves, did not present the draft in due time; but it is alleged that the delay on the part of Judson was unreasonable, and so the court held.

The bill was drawn at Erie in the State of Pennsylvania, at the extreme western end of it, upon persons in the city of New York, and sold to a travelling agent whose residence was in Newark in the State of New Jersey. As all bank-notes in the present day are at par everywhere, the object in purchasing a draft was to prevent loss by theft, robbery, or accident. The business of the agent led him through the different places we have stated, and detained him necessarily on the road; and he was therefore not obliged, nor could it be expected, while so doing, that he would transmit this draft for collection to New York, nor would there be in fact any opportunity to negotiate it until he reached his own home in New Jersey.

We are therefore of opinion that under these circumstances the bill was presented within a reasonable time, and that the defendants are liable to pay the same.

Judgment reversed, and venire de novo awarded.[1]

[1] See Brown v. Olmsted, 50 Cal. 162.

It has been held that the drawer or transferrer of a bill payable on demand is not discharged by a failure to make presentment within the usual time, if the delay was contemplated by the parties at the time of drawing or transfer. Bridgeport Bank v. Dyer, 19 Conn. 136; Woodruff v. Plant, 41 Conn. 344; Mohawk Bank v. Broderick, 10 Wend. 304; 13 Wend. 133 (*semble*); Stephens v. McNeill, 26 Barb. 651; Darnall v. Morehouse, 45 N. Y. 64 (*semble*); Werk v. Mad River Co., 8 Oh. St. 301.

So also a delay caused by the adoption of a circuitous, but customary, mode of presentment has been considered excusable. Taylor v. Sip, 30 N. J. 284, 291; Mohawk Bank v. Broderick, 10 Wend. 304; 13 Wend. 133.

Conf. Hare v. Henty, 10 C. B. N. S. 65; Bailey v. Bodenham, 16 C. B. N. S. 228; Prideaux v. Criddle, L. R. 4 Q. B 455. — Ed.

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L. SHUSTER SMITH AND ANOTHER, APPELLANTS, v. ABRAHAM D. A. MILLER, IMPLEADED, &c., RESPONDENT.

IN THE COURT OF APPEALS, NEW YORK, MARCH 28, MAY 6, 1873

[*Reported in 52 New York Reports*, 545.]

APPEAL from judgment of the general term of the Superior Court of the city New York, affirming a judgment in favor of defendant, entered on a verdict.

This action was brought to recover the purchase price of a bill of goods sold by plaintiffs to defendant. The goods were sold Nov. 5, 1867. Defendants, who resided at Buffalo, on the 18th of November, enclosed to plaintiffs a draft at sight upon James K. Place & Co. of New York, for the amount of the purchase. The draft was received by plaintiffs about 10 A. M. of the 19th; was presented for payment about 1 P. M. The drawees gave in payment a check on the Manufacturers' National Bank for amount of draft. This check plaintiffs indorsed, and deposited in the Citizens' Bank at about 1.30 P. M. They wrote to defendant that the draft had been received and paid. At the time of giving this check and during that day, the check was good. On the next day, the check was returned from the clearing-house, the bank upon which it was drawn having refused to pay, for the reason that the makers had stopped payment, and the bank had applied the balance on deposit upon a debt due by them to the bank. No further demand of payment of the draft appears to have been made. Further facts appear in the opinion. The court directed a verdict for defendant.

Ambrose Monell, for the appellants.[1]

Joseph H. Choate, for the respondent.

RAPALLO, J. When this case was before us on the appeal taken by the defendant (43 N. Y. 171), the judgment was reversed on two grounds. One was that the plaintiffs having received the draft and undertaken its collection, they were bound to show that they demanded payment of the drawees within due time, that payment was refused, and notice of such non-payment duly given to the drawers; and that in the absence of such proof they could not recover against the drawers, either upon the draft or the indebtedness for which it had been given. The facts then appearing were that the plaintiffs had presented the draft for payment upon the same day upon which they received it, and that the drawees, so far from refusing payment, gave their check

[1] The argument of counsel for the appellants has been omitted. — ED.

for the amount, which check was good at the time, and during all the business hours of the day when given. That it was deposited by the plaintiffs in bank for collection, without having first been presented for certification at the bank upon which it was drawn, and went into the clearing-house the next day, when it was rejected, the maker of the check having in the mean time stopped payment, and the bank in which they kept their account having applied their funds to a debt due by them to such bank. No further demand of payment of the draft was shown to have been made upon the drawees, but the draft was allowed to remain in the hands of the drawees, and the plaintiffs retained the check.

We held that, in order to preserve their recourse upon the drawers of the draft, the plaintiffs should, when the check was dishonored, have demanded back the draft and again presented it for payment, and, in case of refusal, given notice of such demand and refusal to the drawers, as was done in the case of Turner *v.* Bank of Fox Lake [1] and Burkhalter *v.* Second Nat. Bank of Erie.[2] There had been in fact, in the present case, no refusal by the drawees to pay the draft.

These facts were not changed on the second trial. The learned judge, who dissented in the court below from the affirmance of the judgment rendered on the second trial, expresses the opinion that there was no necessity for protesting the draft, as the drawees, J. K. Place & Co., were insolvent, and the drawers could therefore sustain no loss.

Where the omission of demand and notice cannot possibly operate to the injury of the indorser of a note or drawer of a draft, he will not be discharged; but such injury is presumed until the plaintiff, by proof on his side, removes all chance of damage. It has been held in some cases that, if the indorser (drawer) know of the maker or acceptor's absolute and recorded insolvency, that is enough, though any insolvency short of that will not do: our own cases have not gone so far toward excusing want of demand. See Com. Bank *v.* Hughes.[3] The mere insolvency of the drawee or acceptor of a draft is no excuse for neglecting to present it for payment. Jackson *v.* Richards,[4] Hunt *v.* Wadleigh,[5] Esdaile *v.* Lowerby,[6] Edwards on Bills, 486 [marg.]. There is no pretence that the drawers had not funds in the hands of the drawees. The laches of the plaintiffs in not again demanding payment of the draft when the check was returned were sufficient to discharge the liability of the defendants as drawers of the draft, and it consequently extinguished the debt for which the draft was given. Story on Bills, § 109, and note.

[1] 8 Keyes, 425. [2] 42 N. Y. 588. [3] 17 Wend. 98, and cases cited.
[4] 2 Caines, 343. [5] 26 Me. 271. [6] 11 East, 114.

The other ground upon which we reversed the former judgment was that the check was good when given, and would have been paid or certified if presented with reasonable diligence, and that the amount of the check had been lost through the neglect of the plaintiffs to present it for certification or payment on the day on which it was received by them, they having had about two hours of that day in which they might have presented it, and that this neglect discharged the drawers of the draft.[1] The plaintiffs had received from the drawees of the draft the means of obtaining the amount thereof; and by their own laches these means became unavailable, and the amount was lost both to them and the defendant. To meet this defence, evidence was introduced on the second trial for the purpose of showing that it was the universal custom in New York to deposit such checks in banks for collection through the clearing house, without first presenting them for certification at the bank upon which they were drawn. We think that the plaintiffs failed to prove any such custom. Some witnesses testified that they were not in the habit of having checks certified before depositing them for collection. But the whole current of the evidence was to the effect that a large proportion of the checks deposited in bank for collection were certified before being deposited, and that each depositor exercised his own judgment as to whether or not to have checks certified before depositing; that, if there was any doubt as to the responsibility of the maker of a check, it was customary to have it certified; and that, when checks were deposited without being certified, this was done on the ground that the holder had such entire confidence in the responsibility of the maker that he was willing to take the risk of the check remaining good on the next day, and that the question whether or not the check should be presented for certification before being deposited was determined by the amount of confidence the holder had in the drawer of the check. There was some slight conflict in the evidence on this subject, but not sufficient, we think, to require the submission of the question to the jury, or to have justified them in finding the universal custom claimed by the plaintiffs to exist. There was positive and uncontradicted evidence of a contrary usage on the part of many dealers, and this showed that the custom testified to by one or two of the witnesses was not general. It is not necessary to decide

[1] Strong v. King, 85 Ill. 9; Kobbe v. Clark, 4 Seld. notes, p. 11; Caldwell · Sanderson, 8 Banker's Magazine, 962, *accord.*

Turner v. Bank of Fox Lake, 8 Keyes, 425; 2 Tr. App. 344, s. c.; Johnson v. Bank of N. America, 5 Rob. (N. Y.) 554, 591 (*semble*); Burkhalter v. 2d Nat. Bank, 42 N. Y. 538, *contra.*

Conf. Commercial Bank v. Union Bank, 11 N. Y. 214; Nunnemaker v. Lanier, 48 Barb. 234. — Ed.

whether, in case the custom had been proved, it would have governed the question of defendants' liability.

On both grounds, we think the judgment should be affirmed.

All concur. *Judgment affirmed.*

PIER v. HEINRICHSHOFEN.

In the Supreme Court, Missouri, October Term, 1877.

[*Reported in* 6 *Central Law Journal*, 285.]

From the St. Louis Circuit Court: —

Botsford & Williams and *Fisher & Powell*, for plaintiffs in error.

Slayback & Heussler, for defendants in error.

Hough, J., delivered the opinion of the court. This was an action brought by the plaintiffs, as holders of a negotiable promissory note, against the defendants, as indorsers thereof. The questions presented for determination are, whether the plaintiffs used due diligence in making demand of payment, and gave the requisite notice of non-payment to the defendants.

The facts are as follows: The note in question matured on the 4th day of July, 1861, and was payable at the banking-house of F. & G. Willins, in the city of St. Paul, Minnesota. Some time in April, 1861, the plaintiffs delivered the same to the Bank of Cooperstown, at Cooperstown, New York, for collection. At that time, a letter, in due course of mail, would reach St. Paul from Cooperstown in about six days. The cashier of the Bank of Cooperstown sent the note by mail to its regular correspondent, the Bank of St. Paul, in the city of St. Paul, for collection, in ample time, as the cashier stated, for it to reach its destination by ordinary course of mail, before the maturity of the note. When the letter reached St. Paul, the Bank of St. Paul had made an assignment, and, the envelope having printed on it the words "From the Bank of Cooperstown," the postmaster at once returned it to the Bank of Cooperstown, with the indorsement "Bank failed." The letter was received by the Cooperstown Bank in the original envelope, unopened, on the 9th day of July, 1861, and on the same day the note was returned by mail to St. Paul, in a letter directed to F. & G. Willins, who caused it to be presented and protested on the 15th day of July, 1861, the day on which it was received. The defendants contend that there was a want of diligence in not sending the note in time to guard against such contingencies as the evidence discloses, and that the action of the postmaster in the premises is no

sufficient excuse for the failure to present for payment on the day of the maturity of the note.

Professor Parsons, in his treatise on Notes and Bills, says: "Ordinarily, any failure to present a note at the proper time, by reason of the negligence of an agent, would discharge an indorser; but, where the holder makes use of the public mail for the purpose of transmitting the note to the proper place in season to have a legal demand made, and without any negligence on his part, we should say that he would not lose his remedy on an indorser, if through any accident or disorder, or the negligence or mistake of the post-office clerks, the note does not reach the destined place in season to make demand on the very day of maturity." Vol. I. p. 461. In support of his text, he cites the case of Windham Bank v. Norton, Converse, & Co.,[1] the leading features of which bear such a striking resemblance to the case at bar that we think it proper to present them.

The draft in that case was drawn upon and accepted by Mansfield, Hall, & Stone, of Philadelphia, payable at the Farmers' and Mechanics' Bank in said city on the 2d day of June, 1849, and was indorsed by the defendants to the plaintiffs in the month of February, 1849. During the same month, the bill was indorsed and delivered to the Ohio Life and Trust Co., a banking corporation in the city of New York, for collection. At that time, there were two mails per day from New York to Philadelphia; one leaving at 9 A. M., and one at 4 P. M., both of which were due at Philadelphia five hours after their departure. The Farmers' and Mechanics' Bank was the Philadelphia correspondent of the Ohio Life and Trust Co. On the morning of June 1st, the cashier of the Ohio Life and Trust Co. enclosed this draft, with others, properly addressed to the Farmers' and Mechanics' Bank, and deposited said letter in the post-office at the city of New York, in time for the afternoon mail of that day for Philadelphia. This mail arrived at Philadelphia in due time, but the mail-bags containing the letters for Philadelphia were by the post-office clerks in New York marked to be forwarded to Washington, and were therefore carried to the latter place. The mistake was discovered at Washington, and the mail returned to Philadelphia, reaching there on the 3d of June; and on the next day, June 4th, payment was demanded and refused, protest made, and notice given. In discussing the question of negligence or reasonable diligence, the court said: "The only remaining inquiry is whether the plaintiffs are chargeable with negligence for not forwarding the draft in question by an earlier mail from New York to Philadelphia. It was sent by the usual legal and proper mode. It was deposited in the post-office in season to reach the place

[1] 22 Conn. 213.

where it was payable before it fell due by the regular course of the next mail, and there was no reason to believe that it would not be there duly delivered. It was actually sent by that mail, and, but for the mistake of the postmaster where it was mailed in misdirecting the package containing it, would have reached its proper destination, and been received there in season for its presentment when due. It in fact reached that place when it should have done, but was carried beyond it in consequence of that mistake. As that mistake could not have been foreseen or apprehended by the plaintiffs, it is not reasonable to require them to take any steps to guard against it. Indeed, they could not have done so, as they had no control or supervision over the postmaster. They had a right to presume that the latter had done his duty. They could not know that he had misdirected the package until it was too late to remedy the consequences. The occurrence of the draft being sent beyond its place of destination was therefore, so far as the plaintiffs were concerned, an unavoidable accident."

We have been referred by defendants' counsel to the case of Schofield *v.* Bayard,[1] as being in direct conflict with the case just cited from Connecticut; but a careful examination of the facts in Schofield *v.* Bayard will show that there is no conflict whatever between the two cases. The latter case contains an element of negligence on the part of the holder, which was absent from the case of Bank *v.* Norton, and which is wanting in the case at bar. The facts were that a bill drawn by a firm in New York on a house in Liverpool was accepted *supra protest* by a house in London. The bill was sent by the holder who resided in Birmingham, to Liverpool for payment, instead of London, where it was payable. The holder's correspondent at Liverpool returned the bill in a letter to the holder, with advice that the presentation should be made in London; and the letter was put in the post-office, but by some oversight of the clerks in the post-office it did not get to Birmingham in time for the holder to forward it to London and have a regular demand made. It was held that the drawers were discharged. The court said: "This case presents no impossibility, if due diligence had been used. The plaintiff should not have sent the bill to Liverpool at all. It is true that, after the letter containing it had been left at Liverpool on the 10th of November, it could not have reached London in season; but it was the fault of the plaintiffs to have parted with the bill in the manner they did. Instead of sending it to Liverpool, they should have sent it to London, and then it would have been in season, and probably would have been paid. I am of the opinion that, by the law-merchant, payment should have

[1] 3 Wend. 488.

been demanded in London on the 12th of November; and that not having been done, and there being no impossibility to prevent it but what is attributable to the want of due diligence on the part of the holders, the defendants are legally discharged, and are entitled to judgment."

It will be seen that the court places its judgment expressly upon the ground that the holder was guilty of negligence in sending the bill to Liverpool, and this fault of his produced the impossibility by virtue of which he claimed to be discharged.

In the present case, the letter containing the note was not misdirected; it was properly directed: it actually reached St. Paul in time, and but for its unauthorized return by the postmaster the probabilities are that some agent or representative of the suspended bank would have received it in time to make due presentment, as the testimony tends to show that the representatives of the bank continued to receive letters addressed to it after its suspension. The holders therefore exercised due diligence in sending the note where they did: its arrival in time demonstrates that fact; and they were not required to make provision in advance for a possible but unanticipated suspension of the Bank of St. Paul before arrival of their letter, or for an unwarrantable interference with the same by the public officer in charge of the mails after its arrival. We are of the opinion, therefore, that under the circumstances of this case the demand was reasonably made.[1]

The judgment will be reversed, and the cause remanded. All concur.[2]

[1] A portion of the case relating to a question of notice has been omitted. — Ed.

[2] Windham Bank v. Norton, 22 Conn. 213. — *accord*.

Conf. Schofield v. Bayard, 3 Wend. 488. — Ed.

SECTION I. — *Continued.*

Presentment for Payment and Acceptance — (continued).

(*b*) Hour of Presentment.

PARKER *v.* GORDON.

In the King's Bench, May 16, 1806.

[*Reported in* 7 *East*, 385.]

In an action by the indorsee of an inland bill of exchange against the drawer, which was tried before Lord Ellenborough, C. J., at the last sittings in term, it appeared that the bill had been accepted by the drawee, payable at Davison & Company's, who were his bankers in London; that on the day when it became due it was presented for payment by a notary's clerk at the banker's shop, but not till past six o'clock in the evening, after the usual banking hours, when the shop was shut and the clerks gone away. And the only proof of notice to the drawer of this dishonor was by showing that a letter directed to him, containing such notice, was put into the receiving post-office in Inner Temple Lane. But his lordship was of opinion that the holder of the bill, by taking this special acceptance for payment of it at the acceptor's banker's, bound himself to present it for payment at the usual banking hours there; and, not having done so, there was no evidence of the bill's having been presented for payment to the acceptor, and dishonored. But, supposing that were otherwise, yet that the mere putting of the letter into the post-office, without further evidence that it reached the hands of the drawer, was not sufficient proof of notice of the dishonor; and therefore he nonsuited the plaintiff.

Marryat now moved to set aside the nonsuit; and, as to the sufficiency of the notice to the drawer of the dishonor, he cited Sanderson *v.* Judge, where the putting a letter to the indorser into the post-office, informing him of the dishonor of the note by the maker, was holden sufficient to charge the indorser. [And on the authority of this case, which had not been mentioned at the trial, Lord Ellenborough, C. J., said he saw no objection to granting a rule to show cause. But this became unnecessary by the opinion of the court on the other point.] On the other ground, he contended that whether the bill were accepted payable at a banking-house (which, however, did not appear upon the face of it, for Davison & Co. were not stated to be bankers on the

face of the bill), or at any other place, could not alter the general law respecting the time for making a demand of payment, which might be done at any reasonable hour of the day, without reference to what are called banking hours, of which the law could not take notice; it being a matter depending altogether on the personal convenience of different bankers, those in the city keeping their houses open for payments till five o'clock, and those at the west end of the town till six in the evening. And, in Leftley v. Mills,[1] the court said they could not take notice of what were called banking hours, but seemed to consider that, if a demand were made at any reasonable time of the day, it would be sufficient: this, therefore, was a question for the jury to have decided.

Lord Ellenborough, C. J. There was no dispute about the facts at the trial; and then I conceive that whether the demand were made within due time or not is a question of law. The question is now brought to this, whether the bill were dishonored. The person on whom it was drawn accepted it, payable at Davison & Company's, who were his bankers, which was done for the purpose of facilitating the payment of it; and, if it were refused payment there on due presentation, it would be a sufficient dishonor of the bill whereon to charge the drawer. But, if a party choose to take an acceptance payable at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly; and, if by going there out of due time the bill be not paid, it is his own fault, and he cannot proceed as upon a dishonor of it, at least not without going a step further, and presenting it for payment to the party himself: otherwise, it is fishing for the dishonor of a bill made payable at a banker's, to present it there for payment at a time when it is known in the usual course of business that it cannot be paid.

Grose, J., declared himself of the same opinion.

Lawrence, J. The party might have refused to take the special acceptance; but, if he choose to take the acceptance in that manner, payable at the banker's, does he not agree to take it payable at the usual banking hours? If this were a sufficient demand for payment, no person would be safe in lodging money at a banker's for the purpose of answering bills made payable there; for if the holder might apply for payment at any time of the day, by making his application at an unusual time, it would insure the dishonor of the bill. But, where a bill is accepted in this manner, it must be understood by all parties concerned that it is to be presented for payment at the banker's within the usual hours of business; and, not having been so

[1] 4 Term Rep. 171.

presented in this case, there was no evidence of the dishonor of it, in order to charge the drawer.

Le Blanc, J. If a party will take an acceptance in this manner, payable at a banker's, he must present it at a proper time, according to the known method of conducting the banking business; otherwise, the greatest inconveniences to trade would ensue. *Rule refused.*[1]

BARCLAY *v.* BAILEY.

At Nisi Prius, coram Lord Ellenborough, C. J., December 17, 1810.

[*Reported in* 2 *Campbell*, 527.]

Action against the drawer of a bill of exchange accepted by one David Hardy.

At eight in the evening of the day the bill became due, it was presented at the house mentioned on the face of it as the drawee's place of residence, when the answer given by a person who came to the door was that Mr. Hardy had become bankrupt, and removed into another quarter of the town. On the part of the defendant, it was proved that he had a person stationed at this house for the purpose of taking up the bill from nine in the morning till four in the afternoon, but that no one presented it during that time; and the point was strenuously argued that a presentment so late as eight in the evening was insufficient to charge the drawer.

Lord Ellenborough. I think this presentment sufficient. A common trader is different from bankers, and has not any peculiar hours for paying or receiving money. If the presentment had been during the hours of rest, it would have been altogether unavailing; but eight in the evening cannot be considered an unseasonable hour for demanding payment at the house of a private merchant who has accepted a bill. *The plaintiff had a verdict.*[2]

[1] Elford *v.* Teed, 1 M. & Sel. 28 (6 P. M., too late); Whitaker *v.* Bank of England, 1 C. M. & R. 744 (6 P. M., too late, *semble*), *accord.*

Conf. Leftley *v.* Mills, 4 T. R. 170; Planters' Bank *v.* Markham, 6 Miss. 397; Harrison *v.* Crowder, 14 Miss. 464. — Ed.

[2] Morgan *v.* Davison, 1 Stark. 114 (6 or 7 P. M., in time); Wilkins *v.* Jadis, 2 B. & Ad. 188 (8 P. M., in time); Triggs *v.* Newnham, 1 C. & P. 631; 10 Moore, 249, s. c. (8 P. M., in time); Dana *v.* Sawyer, 22 Me. 244 (11 P. M., too late); Farnsworth *v.* Allen, 4 Gray, 453 (9 P. M., in time); Cayuga Bank *v.* Hunt, 2 Hill, 635; Nelson *v.* Fotterall, 7 Leigh, 179 (*semble*), *accord.* — Ed.

GARNETT v. WOODCOCK.

IN THE KING'S BENCH, JANUARY 23, 1817.

[*Reported in* 6 *Maule & Selwyn*, 44.]

THE plaintiff declared, as the indorsee of a bill of exchange accepted payable at Denison & Co., London, and averred a presentment at Denison's for payment; and at the trial before Lord Ellenborough, C. J., at the London sittings after last term, in order to make good the averment, proved that the notary's clerk called with the bill at the banking house between the hours of six and seven in the afternoon; that the clerks were gone, but a servant was stationed there, who, on the bill being presented, returned for answer that there were no orders. There was a verdict for the plaintiff.

And now Campbell moved to set it aside on the ground that this being a presentment out of banking hours was irregular, and therefore insufficient; and he cited Parker v. Gordon.

But *per Curiam*. Here, though the presentment was out of banking hours, there was a person stationed for the purpose of returning an answer, and an answer was returned, the same as would have been if the presentment had been within the hours of business. The answer was not that the party came too late, but that there were no orders: the object of the presentment was therefore completed, after which it cannot be open to either party to aver that it was out of time. *Rule refused.*[1]

[1] Henry v. Lee, 2 Chitty, 124; Crook v. Jadis, 6 C. & P. 191; First Nat. Bank v. Owen, 23 Iowa, 185; Flint v. Rogers, 15 Me. 67; Allen v. Avery, 47 Me. 287; Shepherd v. Chamberlain, 8 Gray, 225; Comm. Bank v. Hamer, 8 Miss. 448; Cohea v. Hunt, 10 Miss. 227; Goodloe v. Godley, 21 Miss. 233; Utica Bank v. Smith, 18 Johns. 230; Syracuse Bank v. Holliston, 17 N. Y. 46; Lafayette Bank v. McLaughlin, 4 West. L. J. 70, *accord*. — ED.

T.

THE SALT SPRINGS NATIONAL BANK, RESPONDENT, v. WILLIAM H. BURTON, IMPLEADED, &c., APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, OCTOBER, 1874.

[*Reported in* 58 *New York Reports*, 480.]

APPEAL from judgment of the general term of the Supreme Court in the fourth judicial department, affirming a judgment in favor of plaintiff entered upon the decision of the court upon trial at circuit without a jury.

This action was brought upon a promissory note made by defendant Phelan and indorsed by defendant Burton, who alone defended. The note was made payable at the First National Bank of Waterloo.

The court found the following facts, among others: That it was the ordinary custom of said bank to commence its business at nine o'clock in the forenoon of the day, and to close the same at four o'clock in the afternoon; that on the day said note fell due the defendant Burton was ready to pay the same, and sent Phelan, the maker of the note, to said bank several times during banking hours to see if said note was there, and ascertain the amount of the same, but he was informed each time that the note was not in the bank; that on said day Thomas J. Leach, the cashier of the plaintiff, went to Waterloo, having said note in his possession, but did not arrive there till about five o'clock in the afternoon. He went to the said bank and obtained entrance. He found therein Myndert D. Mercer, who was the cashier of said bank and also a notary public. He then and there presented to said Mercer said note, and demanded payment thereof, and payment was refused for the reason that no funds had been left with the bank to pay the same: thereupon, said Mercer protested said note. This was the first time that said note was presented to said bank for payment on that day.

As a conclusion of law, the court held the defendant Burton liable, and directed judgment for the amount of the note.

R. Ten Eyck, for the appellant. The demand of payment was insufficient to charge the indorser. Bank of Syracuse *v.* Hollister,[1] N. I. R. M. Co. *v.* Bishop.[2] The fact was assumed on trial that the indorser was ready and offered to pay during banking hours, and the case was disposed of on that assumption. It cannot be questioned on appeal. People *v.* Cook,[3] Smith *v.* Hill,[4] Sipperly *v.* Stewart.[5]

[1] 17 N. Y. 47. [2] 8 E. D. Smith, 48. [3] 4 Seld 78
[4] 22 Barb. 658. [5] 51 Barb. 66.

Levi W. Hall, for the respondent. The maker had the entire day in which the note fell due to pay in. Smith v. Aylesworth,[1] Oothout v. Ballard.[2] Though presentment was made after banking hours, as it was presented to a proper officer it was sufficient; and, no funds being provided to pay, the indorser was liable. 1 Starkie, 386; 13 East, 459; N. I. R. M. Co v. Bishop,[3] Oothout v. Ballard,[2] Smith v. Aylesworth,[1] Bank of Syracuse v. Hollister,[4] Shepherd v. Chamberlain.[5] The indorser was not relieved by his sending the maker to the bank to inquire for note. Moore v. Britton.[6]

RAPALLO, J. When a note is made payable at a bank, the general rule is that, in order to charge the indorser, the note should be presented for payment at the bank during its customary business hours, for if the holder goes to the bank after those hours and finds it closed, or no one there authorized to answer to the demand, he can make no valid demand, and the indorser will be discharged. Parker v. Gordon; Byles on Bills, 205, 206. In other cases, the holder has the whole day to present the bill or note, the only limitation being that he must present it at a reasonable hour; and this may depend upon the circumstances of the case. Wilkins v. Jadis.[7] But even in the case of paper payable at bank, if after business hours the holder obtains admittance and finds in the bank a person authorized to answer, a demand of such person and refusal for want of funds will in general be sufficient. Bank of Syracuse v. Hollister;[4] Byles on Bills, 212 [ed. of 1836]; Shepherd v. Chamberlain,[5] Flint v. Rogers,[8] Allen v. Avery,[9] Henry v. Lee,[10] Garnett v. Woodcock.

In the present case, the customary business hours of the bank at which the note was payable ended at four o'clock P. M. The note was not brought there for presentation until five P. M., but the holder was then admitted into the bank, and there found the cashier, of whom he demanded payment, which was refused on the ground that no funds had been left with the bank to pay the same. The only question raised in the case is as to the sufficiency of that demand under the special circumstances.

It is not disputed that the cashier was a proper person of whom to make the demand, but it is considered, on the part of the appellant, that there exists a feature in this case which distinguishes it from all those in which a demand after business hours has been held sufficient; viz., that up to the close of business hours on the day of maturity the indorser had been endeavoring to find the note for the purpose of

[1] 40 Barb. 104. [2] 41 Barb. 33. [3] 8 E. D. Smith, 48.
[4] 17 N. Y. 46. [5] 8 Gray, 225. [6] 22 La. 64.
[7] 2 B. & A l. 188. [8] 15 Maine, 67. [9] 47 Maine, 287.
[10] 2 Chitty, 124.

paying it, but that it was not at the bank, and it is claimed that, if it had been presented at the bank during business hours, it would have been paid. This claim is founded upon the finding of the court, that on the day the note fell due the indorser was ready to pay it, and sent the maker to the bank several times during banking hours to see if the note was there, and ascertain the amount of the same, but was informed each time that the note was not in the bank.

It was stipulated on the trial that these inquiries were made to enable the indorser to pay the note, and that they were continued up to the time the bank closed; and we think the fair interpretation of the finding is that Burton, the indorser, had the funds wherewith to pay the note, and endeavored to do so, but was prevented by the failure of the holder to present the note at the bank during business hours. The question now before us is whether those facts make the case an exception to the general rule, that a valid demand can be made after business hours, if the holder obtains admittance into the bank, and there finds a person authorized to answer to the demand.

Had the *maker* gone to the bank prepared to pay the note, and waited there for that purpose until the close of business hours, and then left, or had he placed funds in the bank and allowed them to remain there until the close of business hours, and then withdrawn them in consequence of the non-presentation of the note, we are of opinion that a subsequent presentation for payment would not have been sufficient to charge the indorser. The leading English case upon this subject is Parker *v.* Gordon, decided in 1806, in which Lord Ellenborough says: "If a party choose to take an acceptance, payable at an appointed place, it is to be presumed that he will inform himself of the proper time for receiving payment at such place, and he must apply accordingly; and, if by going there out of due time the bill be not paid, it is his own fault, and he cannot proceed as upon a dishonor of it. . . . It is fishing for the dishonor of a bill made payable at a banker's to present it there for payment at a time when it is known, in the usual course of business, that it cannot be paid."

This decision was followed in 1813 in Elford *v.* Teed,[1] where the business hours of a bank are compared to the *horæ juridicæ* of the courts of justice.

The first case in which this rule was qualified is Garnett *v.* Woodcock,[2] where Lord Ellenborough, in 1816, held at Nisi Prius that a presentment at a banker's after banking hours was sufficient, provided a person was stationed there by the banker to return an answer.

Upon these cases are founded all those which follow upon the subject of the presentment of commercial paper made payable at a bank.

[1] 1 M. & Selw. 28. [2] 1 Starkie, 475.

It is to be observed that, in the two cases first cited, Parker v. Gordon and Elford v. Teed, the action was brought by the indorsee of a bill of exchange against the drawer, and the drawer was held to be discharged by the failure to present the bill during business hours; while in the last case, Garnett v. Woodcock, the action was against the acceptor. In this State, where a note or bill is payable at a particular time and place, a demand at the place appointed is not necessary to sustain an action against the acceptor or maker. Wolcott v. Van Santvoord,[1] Caldwell v. Cassidy.[2] But in England, at the time of the decision in Garnett v. Woodcock (though since changed by statute), such demand was necessary. Bowes v. Howe,[3] Sanderson v. Bowes, Dickinson v. Bowes,[4] Rowe v. Young, a doctrine to which Lord Ellenborough had been, individually, decidedly adverse; Lyon v. Sundius.[5] The presentment in Garnett v. Woodcock was at eight in the evening to a boy, who replied that he had no orders, and this was held by Lord Ellenborough sufficient, in an action against the acceptor. But had the action been against the drawer, and had he shown that the acceptor had funds, and would have paid the bill in case it had been presented during business hours, the decision would probably have been different. In the Bank of Syracuse v. Hollister,[6] where the presentment was out of business hours, stress is laid upon the facts that no person had inquired for the note during business hours, and that the maker had no funds in the bank; and, in none of the cases where a demand out of business hours has been sustained, does it appear that any effort had been made to pay the note, except in the case of The Bank of Utica v. Smith[7] and Newark India Rubber Manufacturing Co. v. Bishop.[8] The case in 18 Johnson was decided upon the ground that the presentment was in fact made during business hours, and that the person having the funds should have waited the customary fifteen minutes after three, during which the bank was kept open for the presentment of paper. The case in 3 E. D. Smith presents the very point which arises in the one now at bar, and affords a clear illustration of it. That was an action against two indorsers of a note, payable at bank. One of the indorsers (Bishop) placed funds in the hands of the paying teller for the purpose of paying the note. These funds were not deposited to the credit of the maker, nor entered on the books of the bank: the teller was the agent simply of Bishop, the indorser, to pay the note if regularly presented. The teller remained at the bank until the close of business hours, and then left, the note not having been presented. After he had left, the note

[1] 17 Johns. 248. [2] 8 Cow. 271. [3] 5 Taunt. 30.
[4] 16 East, 108. [5] 1 Camp. N. P. 423. [6] 17 N. Y. 46.
[7] 18 J. R. 230. [8] 3 E. D. Smith, 48.

was presented, and a clerk, being still there, examined the account of the maker, and, not finding sufficient funds to his credit, answered, no funds. Bishop afterward, finding that the note had not been presented during business hours, withdrew the funds which he had placed in the hands of the paying teller.

A verdict having been rendered against both indorsers, Woodruff, J., refused to set it aside as to Bishop, but did set it aside as to the other indorser, and, afterward, in a very clearly reasoned opinion, delivered at general term, demonstrated the justice of his conclusion.

As to Bishop, he had himself undertaken to pay the note, and, on learning that it had not been duly presented, withdrew the funds which he had appropriated to its payment. But, as to the other indorser, the case was different. If the note had been presented within the usual business hours, it would have been paid out of funds provided either by the maker or the first indorser in his behalf, and the second indorser would have been discharged. It was by the omission of the holder thus to present it, and from that cause alone, that the note was not paid at its maturity. The second indorser should not be held under those circumstances. In the case at bar, the finding is not that the *maker* was ready to pay, but that the defendant, the indorser, was endeavoring to pay the note. If he was provided with funds for that purpose, he must have retained them. He knew that the note was not paid, and did not expect the maker to pay it, but had himself undertaken to do so. Under these circumstances, his readiness to pay does not, in our judgment, distinguish the case from that of The Bank of Syracuse *v.* Hollister and those upon which it was based. The defendant cannot have sustained any injury, unless it be the expenses of protest, which are trifling, and about which no point seems to have been made at the trial.

The judgment should be affirmed, with costs.

All concur; GROVER, J., in result. *Judgment affirmed.*[1]

[1] See Newark Co. *v.* Bishop, 3 E. D. Sm. 48. — ED

SECTION I. — *Continued.*

Presentment for Payment and Acceptance — (continued).

(c) PLACE OF PRESENTMENT.

BEECHING AND OTHERS v. GOWER.

AT NISI PRIUS, CORAM GIBBS, C. J., TRINITY TERM, 1816.

[*Reported in Holt's Nisi Prius*, 313.]

THIS was an action for money had and received. The plaintiffs are bankers at Tunbridge. On the 5th of March, 1816, the defendant brought some notes to their bank, which he desired to exchange for Tunbridge notes: they accordingly gave him their own notes, and, amongst other notes, they received from him a £10 note of the Kentish Bank, payable at the banking house at Maidstone, and at Ramsbottom's & Co. in London. The plaintiffs sent the £10 note to London on the evening of the 5th; on the 6th, it was presented for payment at Ramsbottom's, whose house stopped on that day, and the note was dishonored. It was returned to the plaintiffs on the 7th, and notice was then given to the defendant; but he refused to pay it. Ramsbottom's house paid the whole of the 5th of March, and shut up on the 6th. The Maidstone Bank, which had issued this note, paid the whole of the 6th, but shut up on the 7th. Maidstone is only fourteen miles from Tunbridge; and the plaintiffs had an agent there.

Best, Serjt., for the defendant. The plaintiffs have chosen to send this note to London, which was more than double the distance of Maidstone from Tunbridge. Had they sent it to Maidstone on the day on which they received it, or upon any time the next day, it would have been paid. They have been guilty of laches.

GIBBS, C. J. I am of opinion, as the note was payable at both places, that the plaintiffs had an option to present it at either.[1]

[1] A portion of the case relating to a question of evidence has been omitted.

Similarly, the oddly framed notes "payable at any bank," in a given city, may be presented at any bank in the place. Jackson v. Packer, 18 Conn. 342; Page v. Webster, 15 Me. 249; Langley v. Palmer, 30 Me. 467; Malden Bank v. Baldwin, 18 Gray, 154 (overruling a *dictum* in North Bank v. Abbot, 13 Pick. 465); Brickett v. Spaulding, 33 Vt. 107.

When a note is payable at a particular place, in which the maker has at maturity neither a place of business nor a place of residence, the holder will make a due presentment by being present with the note anywhere within the limits of the place named. Hardy v. Woodroffe, 2 Stark. 319; Boot v. Franklin, 8 Johns. 207; Mason v. Franklin, 8 Johns. 202; Meyer v. Hibscher, 47 N. Y. 265, 270 (*semble*).

Conf. Mitchell v. Baring, 10 B. & C. 4. — ED.

GIBB *v.* MATHER AND OTHERS.

IN THE EXCHEQUER CHAMBER, JANUARY 30, 1832.

[*Reported in* 8 *Bingham*, 214.]

[1] TINDAL, C. J. This was an action by the indorsees against the drawer of a bill of exchange after non-payment by the acceptor. Upon the trial of the cause, it appeared upon production of the bill that the drawer in the body of the bill required the drawees to pay to the order of himself "in London" the sum mentioned therein; that the bill was addressed to Messrs. Chapman and Fairclough, Liverpool, with the additional words "payable in London," and that it was by them accepted at "Messrs. Jones, Lloyd, & Co., bankers, London." It appeared, further, that on the day the bill became due it was presented for payment to the acceptors at Liverpool, who refused payment, and that due notice of such refusal was given to the defendant below. The learned judge who tried the cause directed the jury that the evidence above stated was sufficient to entitle the plaintiffs below to recover, and the jury found their verdict accordingly for the plaintiffs below. The propriety of this direction now comes before us upon a bill of exceptions tendered by the defendant below; and the question raised for our consideration is this: whether in an action against the drawer of the bill above set forth, on the ground of non-payment by the acceptor, it is or is not necessary to prove a presentment for payment at the banking house in London, where the same is made specially payable by the acceptance. And we are all of opinion that such special presentment is necessary, in order to enable the holder to recover against the drawer of the bill.

Before the passing of the statute 1 & 2 Geo. IV. c. 78, it was a subject of considerable doubt in the courts of law whether, in the case of a bill drawn generally, but accepted payable specially at a particular place, an action could be maintained against the acceptor, without averring in the declaration and proving at the trial a presentment for payment at the place where the drawee had by his acceptance made the bill payable. Upon that point, the Court of Common Pleas had held a presentment of the bill at the place named in the acceptance to be necessary, on the ground that it was a qualified acceptance only. The Court of King's Bench, on the contrary, had held it was unnecessary to make any such presentment, on the ground that the acceptance

[1] All that is material to an understanding of the case being contained in the opinion of the court, the remainder of the case has been omitted. — ED.

was a general acceptance, with a mere intimation of a place of payment, if the holder thought proper to apply there.

The conflicting opinions of the two courts upon that point were set at rest before the passing of the statute by the judgment of the House of Lords, in the case of Rowe v. Young, by which judgment the opinion held by the Court of Common Pleas was decided to be the law of the land.

But the doubt, which had been formed, was confined to the case where the question arose between the holder and the acceptor: in cases between the indorsee and the drawer, upon a special acceptance by the drawee, no doubt appears to have existed but that a presentment at the place specially designated in the acceptance was necessary, in order to make the drawer liable upon the dishonor of the bill by the acceptor.[1]

Still less did the doubt ever extend to cases where the drawer directed by the body of the bill that the money should be payable at a particular place. In such a case, all the courts at Westminster agreed that the presentment must be made at the place specially designated in the bill itself. This had been decided in the Court of King's Bench, in the case of a banker's promissory note, which was made payable at a place named in the body of the note. Sanderson v. Bowes. The same doctrine was also laid down in the case of Roche v. Campbell,[2] where the action was brought by the indorsee of the note against the indorser. Now, no distinction as to this point can be taken between the drawer of a bill of exchange and the indorser of a promissory note. As to their liability to the holder, they stand precisely in the same situation. It is the acceptor of the bill and the maker of the note who are primarily liable to the holder; and the drawer of the bill, like the indorser of the note, does not become liable until there has been a due presentment made to the party liable in the first instance to pay. The law, therefore, which applies to the indorser of the note, will also govern the case of the drawer of a bill.

Such, then, being the state of the drawer's liability at the time the statute was passed, it must still remain the same, unless that statute has made an alteration therein. But it appears to us that the statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptors alone. The title of the act is to regulate

[1] Ambrose v. Hopwood, 2 Taunt. 61; Huffam v. Ellis, 3 Taunt. 415; Reynolds v. Chettle, 2 Camp. 596; Bush v. Kinnear, 6 M. & Sel. 210; Saul v. Jones, 1 E. & E. 59; Wilmot v. Williams, 7 M. & G. 1017; Shelton v. Braithwaite, 8 M. & W. 252, *accord*. — Ed.

[2] 3 Campb. 247.

acceptances of bills of exchange; and after reciting that it had been adjudged that, where a bill is accepted payable at a banker's, the acceptance thereof is not a general but a qualified acceptance, but that a general practice and understanding had prevailed amongst merchants that such acceptance was a general acceptance, it proceeds to enact that, after the passing of that act, such an acceptance shall be deemed and taken to be, to all intents and purposes, a general acceptance of such bill, unless the acceptance is restricted to payment at the particular place by the words and in the manner directed in the act.

The very reference in the statute to the adjudication by law imports that the legislature intended the statute to apply to those cases only in which doubts had previously existed, and which had been adjudged in law; not to cases like the present, which were free from doubt at the time of passing the act. Again, the enactment comprehends in terms the case of acceptors, and acceptors only, and is silent altogether upon the subject of the liability of drawers and indorsers. It foresees the inconvenience which is cast upon acceptors by the enactment that an acceptance of a bill payable at a particular house shall thenceforth be considered as a general acceptance; and it gives the acceptor the power of protecting himself against such inconvenience by the use of restrictive words in his acceptance. But the inconvenience is as great to the drawer as to the acceptor. If the drawer has directed his money to be paid at a particular place, and after an acceptance made payable at that place the bill should be returned to him dishonored without a presentment to the house where it is made payable, it is as great a hardship upon him as the act had contemplated, and provided for, in the case of the acceptor. If, then, the statute had intended the enactment to apply to the case of the drawer, we cannot but think the same protection would have been given to the drawer which has been given in terms to the acceptor of the bill.

One argument advanced on the part of the plaintiff below is that the acceptor has varied in his acceptance from the original terms in which the bill was drawn; and, as the drawer has been contented to take back the bill with such varied acceptance, it must now be considered as a general acceptance under the operation of the late statute. But the answer to this argument seems to be that the direction contained in the body of the bill is not altered or varied by the terms of the acceptance any further than was necessary for the benefit of the drawer and of all subsequent parties. The drawer directed the drawee to pay the money in London: the drawee accepts, specifying the particular house in London at which he intends to pay the bill. Without such specification, the acceptance might be useless from its generality; and the form of the bill implies that the drawer expected and intended the drawee to make it.

We, therefore, think that as no presentment was made at the house of the bankers in London, where the acceptor had undertaken to pay it, the liability of the drawer never arose, and consequently that the judgment which has been given for the plaintiff below must be

Reversed.[1]

[1] Mitchell v. Baring, 10 B. & C. 4; Lyon v. Holt, 5 M. & W. 250; Brooks v. Higby, 11 Hun, 235, *accord.*

Mason v. Franklin, 3 Johns. 202 (*semble*), *contra.*

In an action against a drawer, acceptance need not be alleged, and therefore if the acceptance is qualified, presentment at the particular place need not be alleged; it is enough to allege presentment generally, but proof of presentment at the particular place must be given. Parker v. Edge, 3 Tyrwh. 864; Harris v. Packer, 3 Tyrwh. 870.

Similarly, to charge the indorser of a note payable at a particular place, presentment must be made at the place named. U. S. Bank v. Smith, 11 Wheat. 171; Sebree v. Dorr, 9 Wheat. 558; Irvine v. Withers, 1 Stew. 234; Roberts v. Mason, 1 Ala. 373; Hartford Bank v. Stedman, 3 Conn. 489; Brandywine Bank v. Cooper, 1 Harringt. 10; Hartwell v. Candler, 5 Blackf. 215; Barbaroux v. Waters, 3 Met. (Ky.) 304; People's Bank v. Brooke, 31 Md. 7; Shaw v. Reed, 12 Pick. 132; Seneca Bank v. Neass, 5 Den. 329; Ferner v. Williams, 37 Barb. 9; Sullivan v. Mitchell, 1 Car. L. R. 482; Smith v. McLean, 2 Tayl. 72; Nichols v. Pool, 2 Jones (N. Ca.) 23 (*semble*); Apperson v. Bynum, 5 Coldw. 341; Watkins v. Crouch, 5 Leigh, 522, *accord.*

Barber v. Bell, 77 Ill. 490; Fuller v. Dingman, 41 Iowa, 50, *contra.* — Ed.

ANDERSON v. DRAKE.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1817.

[*Reported in* 14 *Johns.* 114.]

THOMPSON, C. J., delivered the opinion[1] of the court. This case comes before the court on a demurrer to the second plea. The defendant, being sued as an indorser of a promissory note, pleads specially that the maker of the note had, shortly after the making thereof and before it became payable, removed from the city of New York to Kingston in Ulster County, there permanently to reside, which was well known to the plaintiff; and that no demand had been made upon the maker. The demurrer admits the truth of these allegations. And the question presented is whether a demand upon the maker at Kingston was necessary, in order to charge the indorser.

It does not appear from the declaration that the note was made payable at any particular place; nor is there any allegation, from which we are to infer that the note upon the face of it appears to have been made in New York. The case, however, was argued by the defendant's counsel, upon the admission of that fact; and our opinion is founded on the supposition that the note appears on the face of it to have been drawn in New York, that being at the time the place of residence of the drawer, though before the note fell due he removed to Kingston in Ulster County, there permanently to reside.

Whether, under such a state of facts, a demand on the maker at Kingston was necessary, or whether it was sufficient if made in New York, where the note was drawn, is the point to be decided. Had the note expressly been made payable in New York, a demand there would have been sufficient, notwithstanding the removal of the drawer. Livingston, J., in delivering the opinion of the court in Stewart v. Eden,[2] says, the note being dated in New York, the maker and indorser are presumed to have contemplated payment there. This, however, was not the point directly before the court; and it is evident, from a subsequent part of the opinion, that he did not intend to be understood that New York would have been the place to demand payment of the maker, or to give notice to the indorser, in case of a permanent removal from the city. In Thompson v. Ketchum,[3] the note was dated at Montego

[1] All that is material to an understanding of the case being contained in this opinion, the rest of the case has been omitted. — ED.

[2] 2 Caines Rep. 127. [3] 4 Johns. Rep. 285.

Bay, yet it was not deemed payable there; otherwise, parol evidence would have been inadmissible to prove it was payable at New York. Such evidence would have been repugnant to the written note, if the inference of law was that it was payable at Montego Bay. This point was, in some measure, before the Supreme Court of Pennsylvania, in Fisher v. Evans.[1] It was there contended, in argument, that the place where the bill was drawn and dated must be taken to be the residence of the drawer, and that the holder was not bound to look for him elsewhere. But the chief justice said he knew of no such principle, and that the proper place to give notice to the person entitled to receive it was at his permanent residence.

Bayley, in his treatise on Bills, states the rule to be that, if the drawer or maker cannot be found at the place where the bill or note is payable, and it appears that he never lived there, or has absconded, the bill or note is to be considered as dishonored; but, if he has only removed, the holder must endeavor to find out to what place he has removed, and make the presentment there. This is, in some measure, supported by the case of Collins v. Butler.[2] This rule, I apprehend, cannot be correct to the extent there laid down. The settled law now is that a demand of payment at the place where the note is made payable is enough to charge the indorser. This is so decided in the case of Saunderson v. Judge, and by this court in the case of Stewart v. Eden; but, according to Mr. Bayley, the holder must follow the maker to the place of his removal.

The general rule is that the holder of a note is bound to make use of all reasonable and proper diligence to find the maker, and demand payment, where no particular place is appointed for such payment. And, in determining what shall be considered reasonable diligence, due regard must be had to the security of indorsers as well as to the unembarrassed circulation of negotiable paper. The laying down precise rules, however, on this subject, is attended with some difficulty. In a case decided in this court (but which is not reported), the drawer of the note had removed to Canada: the note was drawn and dated at Albany, though not made payable at any particular place, and it was held that a demand in Albany was sufficient to charge the indorser. I can find no distinction in the books as to the place being within the jurisdiction of the court, which varies the rule on this subject; nor do I see any substantial reason for any such distinction. It is necessary, however, that some rule should be settled; and I am inclined to think that where a note is not made payable at any particular place, and the maker has a known and permanent residence within the State, the holder is bound to make a demand at such residence, in order to charge

[1] 5 Binney, 542. [2] Stra. 1067.

the indorser. Whoever takes such note is presumed to have made inquiry for the residence of the maker, in order to know where to demand payment, and to assume upon himself all the inconvenience of making such demand, and the risk of the maker's removing to any other place before the note falls due. As the demurrer, therefore, in this case admits the permanent residence of the maker to have been at Kingston when the note fell due, and that known to the plaintiff, he was bound to demand payment of the note at that place; and, not having done so, the indorser is discharged. The defendant must, accordingly, have judgment upon the demurrer.

Judgment for the defendant.[1]

SUSSEX BANK v. BALDWIN AND SHIPMAN.

IN THE SUPREME COURT OF JUDICATURE, NEW JERSEY, MAY TERM, 1840.

[*Reported in* 2 *Harrison*, 487.]

IN case, on rule to show cause against a new trial.

Armstrong and *Williamson*, for rule.

J. W. Miller and *P. D. Vroom*, contra.

DAYTON, J. This case was tried at the Sussex Circuit of May, 1838, and verdict had for the plaintiff. Sundry reasons are now relied upon to set the same aside, and I will consider them in their order.

The defendants are the indorsers of a promissory note made by Conrad Teese, October 24, 1836, for $505.61, payable six months after date to the order of Wm. A. Baldwin & Co. (the defendants), and by them indorsed to the plaintiff. The first reason assigned is that the note was not duly presented to the maker for payment;[2] that it was presented at an improper place, to wit, the office of Teese, the maker, and by an improper person, to wit, one Dennis, who swears that he acted as the clerk and under the directions of Wm. Tuttle, who was himself merely the agent of James Hedden, the notary public.

As to the place of presentment, the objection may be disposed of very briefly. It is a point not properly arising under the evidence in

[1] Hartford Bank v. Green, 11 Iowa, 476; La. Ins. Co. v. Shamburgh, 2 Mart. N. s. 511; Oakey v. Beauvais, 11 La. 487; Nailor v. Bowie, 3 Md. 251; McKee v. Boswell, 38 Mo. 567, *accord*. — ED.

[2] Only so much of this case is given as relates to the question of presentment. — ED.

the case. Dennis, the witness, swears that Teese, the maker of the note, told him, Dennis, to present his notes for payment at that place, and that he had been in the habit of doing so. This estops Teese from objecting to the place of presentment; and that which is good against the drawer is good against the indorser. State Bank *v.* Hurd,[1] Whitwell *v.* Johnson.[2] But it is thought advisable that this point be put at rest in this State by an expression of opinion by this court.

It appears by the evidence that the office in question was the regular place of business of the maker; and I have no doubt where a person has an office or known and settled place of business for the transaction of his moneyed concerns, — whether he be a banker, broker, merchant, manufacturer, mechanic, or dealer in any other way, — a presentment and demand at that place (as well as a presentment and demand at his residence) is good in law. It must not, however, be a place selected and used temporarily for the transaction of some particular business, as settling up some old books or accounts merely, but his regular and known place of business for the transaction of his moneyed concerns. The counting-room of a banker or merchant may be a proper place for a demand, though the manufactory or work-shop would not. Yet, if the manufacturer or mechanic have an office or known place of business for the purpose aforesaid, a good demand may be made there.[3] Bank of Columbia *v.* Lawrence, Williams *v.* The Bank of United States;[4] Byles on Bills, 118; State Bank *v.* Hurd.[5]

Nor is there any thing in the objection that the presentment was made by an improper person. It appears by the evidence that Tuttle did the business of Hedden, the notary public, and it must have been with the consent and knowledge of the bank that he employed and directed Dennis, who was his clerk, to present the note in question to the drawers, and put him in possession of the note for that purpose. If the note had been paid on presentment, he could and would have delivered it up to the drawers, and that would have exonerated them from further liability. An authority to make a demand may be created by parol, and the mere possession of the paper is evidence

[1] 12 Mass. 172. [2] 17 Mass. 449.

[3] Draper *v.* Clemens, 4 Mo. 52; Stewart *v.* Eden, 2 Cal. 121; Hunt *v.* Maybee, 8 Seld. 266; Nelson *v.* Fotterall, 7 Leigh, 179; Stainback *v.* Bank of Va., 11 Grat. 260, *accord.*

If the place of business of the drawee or maker is closed, no further presentment is necessary. Wiseman *v.* Chiapella, 28 How. 368; Br. Bank of Decatur *v.* Hodges, 17 Ala. 42; Watson *v.* Templeton, 11 La. An. 137; La. Bank *v.* Satterfield, 14 La. An. 90; West *v.* Brown, 6 Oh. St. 542; Baumgardner *v.* Reeves, 35 Pa. 250; Union Bank *v.* Fowlkes, 2 Sneed, 555. — Ed.

[4] 2 Peters, 100. [5] 12 Mass. 178.

enough of such authority. 3 Kent Com. 108; Bank of Utica v. Smith,[1] Shed v. Brett,[2] Morris v. Foreman,[3] Freeman and others v. Boynton.[4]

There is an impression current in some degree, even with the bar, that a presentment of a note must be by a notary, or at least on his behalf, and that he must protest it upon non-payment, before the indorser is liable. But this is not so. The record of a demand and notice, &c., by a notary entered in his book, according to our statute of 21st February, 1829, Harr. C. 249, may serve to refresh his memory, or, in case of his absence or death, it may be used as evidence of the facts contained in it; but such demand and protest by a notary are not essential to a recovery against the indorser. It was not so by the common or commercial law, nor is it required by our statute. If a notary act in the premises, and make the protest, although sanctioned by general custom, it is not strictly an official act. Nichols v. Webb;[5] 3 Kent Com. 93, 94; 1 Saund. on Pl. & Ev. 295.

Any person may present at its maturity a promissory note of which he is put in possession, and if paid in the ordinary course of business, and taken up, the payment is good; and, if not paid, the demand is good as a groundwork for notice to the indorsers, and that without any protest.[6] The rule is otherwise as to foreign bills of exchange, which must be protested by a notary; and their official seal is plenary evidence in all foreign courts and countries of the dishonor of the bill (*vide* cases above cited).

HORNBLOWER, C. J., FORD and NEVIUS, JJ., concurred. WHITE, J., did not hear the argument, and gave no opinion.

Rule made absolute.

TAYLOR v. SNYDER.

IN THE SUPREME COURT, NEW YORK, MAY, 1846.

[*Reported in* 3 *Denio*, 145.]

ASSUMPSIT on a promissory note by indorsee against indorser. The note was made by M. Snyder, payable to the order of the defend-

[1] 18 J. R. 230. [2] 1 Pick. 401. [3] 1 Dal. 193.
[4] 7 Mass 487. [5] 8 Wheat. 326.
[6] Leftley v. Mills, 4 T. R. 170; Hartford Bank v. Stedman, 3 Conn. 489; Agnew v. Bank of Gettysburg, 2 Har. & G. 478; Freeman v. Boynton, 7 Mass. 483; Hartford Bank v. Barry, 17 Mass. 93; Shed v. Brett, 1 Pick. 401; Bachellor v. Priest, 12 Pick. 399; Seaver v. Lincoln, 21 Pick. 267; Nave v. Richardson, 36 Mo. 180; Utica Bank v. Smith, 18 Johns. 230; Hunt v. Maybee, 3 Seld. 266; Baer v. Leppert, 12 Hun, 516, *accord*. — ED.

ant for $177 in one year from date, no place of payment being mentioned, and was dated at Troy, October 15, 1839.[1]

H. W. Strong, for the plaintiff.

J. D. Willard, for the defendant.

By the Court, Beardsley, J. As the note bears date at Troy, it is presumed to have been made at that place, although the maker then resided in Florida, as was well known to the original holder, Morris, and to Stevenson, to whom it was subsequently transferred. The residence of the maker had not been changed when the note fell due, his domicil still being in Florida.

What, then, is this case? A debtor, whose residence is in Florida, being at Troy, makes a note, which he dates at that place, to his creditor, a resident of this State, for an amount due to him, and procures a friend, residing at Troy, to indorse the same. No place of payment is specified in the note, nor is there any thing to indicate a place, unless that follows from the note bearing date at Troy. The holder knows the residence of the maker to be in Florida; but when the note falls due, instead of making demand of the maker personally, or at his residence or place of business in Florida, payment is demanded at Troy, and not elsewhere. Was this a sufficient demand as respects the indorser? It clearly was, if the note was by law payable at that place, and it as clearly was not, if the note was payable elsewhere. This is the only question to be determined.

The date of a note at a particular place does not make that the place of payment, or at which payment should be demanded for the purpose of charging the indorser. This was expressly adjudged in the case of Anderson v. Drake.[2]

It has been supposed that the case of Stewart v. Eden[3] countenances a different doctrine. Livingston, J., there said, "The note being dated in New York, the maker and indorser are presumed to have resided and contemplated payment there." This remark was in part strictly correct, for the date of the note was presumptive evidence of residence; and in a general sense it may also be true that the date raises a presumption that the parties contemplated payment at that place. Judge Livingston did not say that the note was by law payable at the place of its date; on the contrary, the form of expression conclusively repels that idea. He was not speaking of what the parties were bound to do by the terms of the note, of their legal

[1] The other facts of the case sufficiently appear in the opinion of the court, of which only so much is given as relates to the question of presentment. — Ed.

[2] The learned judge here stated the case of Anderson v. Drake, *supra*, p. 334 — Ed.

[3] 2 Caines, 121.

obligations flowing from their engagements as maker and indorser, but simply of what they were presumed to have contemplated. If the learned judge intended to affirm that a note, when a particular place of payment is otherwise indicated, is by law payable at the place where dated, he would have said so in direct terms, and would not have said it was to be presumed payment at that place was contemplated. This would have been absurd. But in truth the question whether the note in that case was payable where it bore date was not before the court, nor was it there pretended that payment had not been duly demanded. It was an action against the representatives of a deceased indorser; and, although an objection was taken to the form in which the presentment for payment was alleged in the declaration, it was not pretended by any one that the demand of payment had not been strictly correct. The main question in the case was as to the sufficiency of the notice to the indorser, and the remark of the judge was made in discussing that point. I admit that, upon the question of due diligence in giving notice to an indorser, it may have been very pertinent and proper to say that the parties are presumed to have contemplated payment at the place where the note was given and was dated, although such a remark would be altogether out of place in deciding upon the construction of an agreement, and whether the parties, by its terms, were bound to make payment at a particular place. There is nothing therefore in this remark of Judge Livingston which can be made to countenance the idea that a note, when no other place of payment is specified, is by law payable at the place of its date. Anderson *v.* Drake, Bank of America *v.* Woodworth.[1]

Where a promissory note is not made payable at any particular place, the general rule of law is that, in order to charge the indorser, payment must be demanded of "the maker personally, or at his dwelling-house, or other place of abode, or at his counting-house or place of business." Story on Promissory Notes, § 235; Bank of America *v.* Woodworth.[2] But, although such is the general rule, yet under various circumstances a demand in any form or manner may be dispensed with. It is a question of diligence; and if a demand is found to be impracticable, proper efforts for that purpose having been made, the indorser will still be held liable, due notice having been given to him by the holder.

Thus, where the maker has absconded, that will ordinarily excuse a demand, and notice of the fact is sufficient to hold the indorser. 1 Ld. Raym. 443, 743; 3 Kent, 5th ed. 96; Putnam *v.* Sullivan,[3]

[1] 18 Johns. 322.
[2] 17 Johns. 315; s. c. in error, 19 Johns. 391.
[3] 4 Mass. 53.

Lehman v. Jones;[1] Chitty on Bills, 10th Am. ed. 354, n. 1; Story on Promissory Notes, § 237.

Where the maker is a seaman on a voyage, having no domicil in the State, the indorser is liable without a demand being made. Barnett v. Wills.[2] [Dennis v. Coffin?] But, although the maker may be absent on a voyage, if he has a domicil in the State, payment must be demanded there. Dennie v. Walker, Whittier v. Graffam.[3]

And, in every case where the maker has no known residence or place at which the note can be presented for payment, the holder will in like manner be excused from making any demand whatever. Story on Promissory Notes, § 237; Whittier v. Graffam, Putnam v. Sullivan, Duncan v. McCullough.[4] But, in all such cases, the reason for not making a demand must be shown on the trial of the cause. It must appear that the maker had absconded, was at sea, or had no known domicil or place where the note should be presented. The rule is strict that a demand must be made, or a proper excuse shown for its omission.

There is a further exception to the rule requiring a demand to be made of the maker, or at his domicil or place of business; for where a note is made by a resident of the State, who before it is payable removes from the State and takes up a permanent residence elsewhere, the holder need not follow him to make demand, but it is sufficient to present the note for payment at the former place of residence of the maker. M'Gruder v. Bank of Washington, Anderson v. Drake, Dennie v. Walker, Gillespie v. Hannahan,[5] Reid v. Morrison;[6] 3 Kent, 96. And this is just; for it is but reasonable to suppose that neither party, when the note was given, looked for a change of residence to a foreign country, and that each contracted upon the supposition that no such change would take place. Nevertheless, as was said in Dennie v. Walker, "this is an exception to the general rule, and must be construed strictly." "We think," say the court in M'Gruder v. Bank of Washington, "that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand. Precision and certainty are often of more importance to the rules of law than their abstract justice. On this point, there is no other rule that can be laid down, which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases that the indorser should stand committed, in this respect, by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held, in England, to stand committed."

[1] 1 Watts & S. 126.
[2] 4 Leigh, 114.
[3] 3 Greenl. 82.
[4] 4 S. & R. 480.
[5] 4 McCord, 503.
[6] 2 Watts & S. 401.

These exceptions to the general rule, it will be seen, all rest on peculiar reasons. In one, the maker has absconded; in another, he is temporarily absent, and has no domicil or place of business within the State; in a third, his residence, if any he has, cannot be ascertained; while, in the fourth, he has removed out of the State and taken up his residence in another country. In each of these instances, let it be observed, the fact constituting the excuse occurs subsequently to the making and indorsement of the note; and it is this new and changed condition of the maker, and that only, by which the indorser stands committed, without a regular demand.

We are, then, to inquire whether these exceptions are to be multiplied, and extended to a case where no change in the condition of either party has taken place: where the maker, when the note was made and indorsed, had a known residence in another State, and which had remained unchanged at the maturity of the note. It is palpable that this exception, if made, must be placed on some new principle: it cannot be allowed on the ground which upholds the others. The facts in this case are unchanged; and, as the reason for making an exception does not exist, the exception itself should not be allowed. Unless, therefore, the general position is true, that one who indorses for a maker who lives in another State may be "held liable without any demand being made on the maker," I think the defendant was not liable in the case at bar. And, if any such general rule of law, as I have stated, exists, it certainly may be shown; but that it has no existence is, as I believe, not only according to the universal understanding amongst commercial men, but also according to the settled course of business in the commercial world.

The indorsement of a note is an order to the maker to pay the amount to the indorsee or holder, as is specified and agreed in the note, and an engagement by the indorser that, if the note is duly demanded of the maker and not paid, or if it shall be found impracticable to make a demand, the indorser will himself, on receiving due notice, pay the amount to the indorsee or holder. Now, where such an order is drawn upon a maker who resides in another State, and whicl. [this?] is well known to the person in whose favor the order is drawn, upon what principle can it be said that a demand of the maker is unnecessary? The indorsee voluntarily consents to take such an order; and why should he not perform the condition on which the ultimate liability of the indorser depends? I confess I see no reason why he should not. Here is no mistake or misapprehension of fact at the time the indorsement is made. The indorsee knows where the maker resides, and that it is in another State. He knows that by law, unless the intervention of a State line makes a difference, the maker

must be sought where he resides, and the demand must be made there. When the time for payment arrives, the maker is still at his former residence: the facts of the case are precisely as they were when the order was drawn. Why, in such a case, should the State line make a difference in the construction and legal effect of this contract of the indorser? It was fairly entered into between the parties: let it then be fairly observed and performed by them.

I can well understand why such an order made by an indorser upon the maker of a note then residing within this State, but who removes into another State before the note falls due, should receive a different construction, and that it would be unreasonable to require the holder to follow the maker to his new residence in order to demand payment. Here, a new and unlooked for event has occurred, which, like the absconding of a maker or an inability to discover his residence, may very reasonably be held to excuse a demand. In these respects, the indorser should be held to stand committed by the act of the maker. But where the facts, in reference to which the parties contracted, were fully known to them, and are in no respect changed, I am unable to discover any principle which will excuse the maker from making a demand, or using proper diligence to make a demand, as in ordinary cases. The intervention of a State line has, in my opinion, no possible bearing on the question.

I admit that I have not found any case in which this point has been expressly adjudicated, as I have stated it. It seems, however, to have been taken for granted, in the case of M'Gruder v. The Bank of Washington, already referred to. The case of Duncan v. McCullough, Adm'r, &c.,[1] was, in some of its features, much like the one at bar. It was an action against the administrator of an indorser of a note made by one Adams, bearing date at Baltimore in Maryland, June 4, 1814, payable nine months from date, no place of payment being specified in the note. It did not appear, otherwise than by its date, where the note was actually made; and it may be inferred from the evidence that Adams was, at that time, a resident in Green Village, Pennsylvania. It did not appear where he was when the note fell due, and no demand of payment had been made anywhere; nor was it shown that any search for the maker had been made. Here, then, was a note dated at Baltimore, no place of payment being stated in it, the maker living in another State. So far it is the case in hand, yet it was not even suggested by the counsel or the court that a demand was unnecessary, or that Baltimore was the proper place to make the demand. The case was disposed of on other grounds, which could not have been in any respect material, if a demand at Baltimore

[1] 4 Serg. & Rawle, 490.

would have been proper, or if none whatever was necessary. On the trial, the court charged that the plaintiff was bound to prove a demand of payment of the maker, or due diligence used for that purpose, and upon this part of the case the final opinion of the court was thus stated by Chief Justice Tilghman: "If the plaintiff had proved that Adams had absconded, and was not to be found when the note fell due, a demand of payment would have been dispensed with, because it would have been impossible to make it. But no such thing was proved, and therefore a demand was necessary. The note being dated at Baltimore would raise a presumption that Baltimore was the drawer's place of residence, as was decided by the Supreme Court of New York, in 2 Caines, 121. Baltimore, then, was the place at which inquiry should have been made. The court laid down the law fairly. A demand, or at least due diligence in endeavoring to make a demand, was necessary." All this seems to me very just and proper. A demand was necessary: the note was dated at Baltimore, and, if the residence of the maker was unknown, Baltimore was the place where inquiry should have been made. But if, as is now urged, Baltimore was the place to demand payment, or if no demand was required, the argument of counsel, in the case referred to, and the views of the court, were entirely wide of the mark. And here let me observe that, although the date of a note does not make it payable at that place, still, the date may, in one respect, be very important. It raises a presumption that the maker resides there, although it is only presumption. 3 Kent, 96, 97; Lowery *v.* Scott,[1] Galpin *v.* Herd.[2] And, where it becomes a question of due diligence in seeking to make a demand, it may be all important to show that inquiry was made at the place where the note bears date. But here this point is of no consequence, for the residence of the maker was known to all parties; and not the least effort was made to make demand of him where he lived, or at any other place than Troy, where the indorser resided, the maker then being at his home in Florida.

I am aware that Judge Story, in his treatise on Promissory Notes, after adverting to various grounds on which a demand of payment may be excused, says, "It seems also that, if the maker of a promissory note resides and has his domicil in one State, and actually dates and makes and delivers a promissory note in another State, it will be sufficient for the holder to demand payment thereof at the place where it is dated, if the maker cannot personally, upon reasonable inquiries, be found within the State, and has no known place of business there."[3] For this he refers to the case of Hepburn *v.* Toledano.[4] It will be observed that Judge Story does not give to this position the au-

[1] 24 Wend. 358. [2] McCord, 394. [3] § 236. [4] 10 Louis. R. 643.

thority of his name and character: the point is stated doubtingly. It seems, he says, that under such circumstances the maker need not be sought in the State where he resides, and not that it is clear this will excuse the usual demand. The learned author was obviously doing no more than to state what seemed to him to have been decided in Louisiana, and he does it in a manner which precludes the idea that he intended to adopt the principle, or give to it any authority beyond that of the elevated and able tribunal by which the case was determined. I have looked at the report of the case of Hepburn v. Toledano. It was an action against the indorser of a promissory note dated at New Orleans, but not made payable there. When the note was payable, the maker resided in Kentucky; but where his residence was when the note was given is not expressly stated. The only question in the case, as the court said, was whether the holder was obliged to go out of the State to demand payment; but whether that question arose upon a note given by a resident of Louisiana, who had subsequently removed to Kentucky, or by a person who lived in Kentucky when the note was made, is a fact upon which I cannot satisfy myself from any thing to be found in the report of the case. We have already seen that where the maker removes from one State to another, after the giving of a note, the holder need not follow him. This was said in Anderson v. Drake, upon the authority of which the Louisiana case was decided. In the latter case, the court say: "There is some difficulty as to the place where demand is to be made, when the maker of a note or acceptor of a bill has been a resident of the State, and before the time of payment has changed his domicil; but, if he lives in another country, the indorsees cannot be presumed to know his residence, and all that the law requires of the holder is due diligence at that place where the note is drawn. Thus, in the case cited by the appellant, 14 Johns. 116, it is stated by the court to have been previously decided that, where a note was dated at Albany, and the drawer of it afterwards removed to Canada, the demand where it was drawn was sufficient to charge the indorser." And it was held that the demand at New Orleans was sufficient. I must say that my impression upon this case is that the maker of the note had removed from Louisiana after the giving of the note; but, if the fact were otherwise, I think the decision should not be followed. The case is not strictly authority, although harmony in the decisions of the several State courts, upon such a point, is exceedingly desirable. But I cannot assent to the principle that where no change has taken place in the residence of the maker, between the making of the note and the time of its payment, the intervention of a State line dispenses with the necessity of making due demand of payment, or at all affects the

question. I therefore think the nonsuit was right, and a new trial should be denied. *New trial denied.*[1]

NIAGARA DISTRICT BANK *v.* THE FAIRMAN & WILLARD MACHINE TOOL MANUFACTURING COMPANY.

IN THE SUPREME COURT, NEW YORK, JUNE, 1860.

[*Reported in* 31 *Barbour*, 408.]

THIS was an appeal from a judgment ordered at a special term, after a trial at the circuit by the court, without a jury. The action was brought against the defendant, which is a manufacturing corporation, incorporated under the general manufacturing law of this State, as the drawer of a bill of exchange, drawn upon the firm of A. Yerrington & Co. The defendant had its place of business in the city of Rochester. A. Yerrington & Co. resided at Cobourg in Upper Canada. The draft was drawn by J. W. Bissell, describing himself as treasurer of the defendant, payable to the order of himself upon A. Yerrington & Co., and addressed to them at Cobourg. The draft was accepted by Yerrington & Co., payable at the Bank of Upper Canada, Port Hope. The draft was presented for payment at the Bank of Upper Canada in Port Hope. No notice of non-payment was given to the defendant; but a notice was addressed by the notary, by mail, to "J. W. Bissell, Esq., Rochester, N. Y." There was no evidence on the trial of any other presentment or notice of non-payment to charge the defendant; nor was there any evidence to show that the notice addressed to Bissell ever came to the knowledge of the defendant. The judge before whom the cause was tried having rendered a judgment for the plaintiff, the defendant excepted and appealed to the general term.

S. Mathews, for the appellant.

G. F. Danforth, for the plaintiff.

BY THE COURT, E. DARWIN SMITH, J. The acceptance of the draft in this case by the drawees, by writing their copartnership name upon it, was a proper acceptance according to the terms of the bill. Upon this acceptance, the holders would have been bound to present the bill for payment to the acceptors, at their place of residence at Cobourg. But this acceptance is of no avail to the plaintiff; for it is not pretended that it was at all acted upon by presentment at that place, or protested

[1] Pierce *v.* Whitney, 29 Me. 188; Freeman *v.* Boynton, 7 Mass. 483 (*semble*); Bank of Orleans *v.* Whittemore, 12 Gray, 469; Spies *v.* Gilmore, 1 Comst. 321; Lightner *v.* Will, 2 W. & S. 140, *accord*.

Conf. Smith *v.* Philbrick, 10 Gray, 252. — ED.

for non-payment upon personal demand of the acceptors at their place of residence.

The rights of the parties, therefore, depend entirely upon the question whether the acceptance of the bill, also indorsed thereon by the drawees in the words following: "Accepted and payable at the Bank of Upper Canada, Port Hope," is a valid acceptance, so as to dispense with a personal demand of the drawees at their place of residence. There is no proof in the case showing the relative distance of Port Hope from Cobourg, the place of residence of the acceptors; and, though the court may not be bound to take judicial notice of the political divisions of foreign countries, we must know that Port Hope and Cobourg are two distinct places, and must necessarily consider that the place where this bill was made payable by this special acceptance thereof was not the place of residence of the acceptors.

If the Bank of Upper Canada, where this bill was made payable by the acceptors, was located in the same city or town or village where such acceptors resided, according to the case of the Troy City Bank *v.* Lauman,[1] the acceptance payable at such a bank would have been entirely proper.[2] Such acceptance is not a departure from the tenor of the bill. It merely fixes a place of payment for the mutual convenience of the acceptors and the holder, and can work no possible injury to the drawer or indorsers, as it will not affect the time for the presentment of the bill to, or for the service of notice of non-payment on the parties entitled to such notice.

But an acceptance of a bill at a different place from that of the residence of the drawee, by necessary implication from this case of the Troy City Bank *v.* Lauman, must be a material departure from the bill. This must be so upon principle. The acceptance becomes a part of the bill; and any material variance from the tenor and import of the bill, made in the terms or manner of the acceptance, taken or assented to by the holder, must be at his own risk, and must discharge the drawer, if due presentment is not afterwards made at the proper place, and due notice given of the non-payment of the bill. This was the principle asserted in the case of Woodworth *v.* The Bank of America,[3] where a promissory note was made, dated at Albany and indorsed in blank. After the indorsement of the note, a memorandum was written on the margin, "Payable at the Bank of America." This was held to

[1] 19 N. Y. Rep. 477.

[2] Troy Bank *v.* Lauman, 19 N. Y. 477; Myers *v.* Standart, 11 Oh. St. 29, *accord*. See Sebag *v.* Abitbol, 4 M. & Sel. 446; *supra*, p. 23, n 2

Conf. Shuler *v.* Gillette, 12 Hun, 278. — Ed.

[3] 19 Johns. 391.

be a material alteration of the bill, because it made it payable at a different place from the residence of the maker, and dispensed with a personal demand upon him for payment, and extended the time for the receipt of a notice of the dishonor of the note. This case is within the principle of that case. Port Hope, where the Bank of Upper Canada is located, is, I understand, distant about ten miles from Cobourg; but, so far as the proof shows in this case, it may be 150 miles or more. In such a case, the materiality of the alteration of the bill in the mode of its acceptance would be quite apparent. It might make a difference of several days in the time of the receipt by the drawer of the notice of non-payment. If the place of payment, in such a case, may be fixed ten miles distant from the place of residence of the acceptor, it may be 100 or 150 miles with equal reason. I think there can be no safe rule except to confine the power of designation, by the acceptor, of the place of payment to some place within the limits of his own city, town, or village.

This question is very elaborately discussed in the answers of the twelve judges of England to an inquiry of the House of Lords in the case of Rowe *v.* Young. In that case, all the judges, in opinions given *seriatim*, substantially agreed in opinion that "a qualified acceptance, making the bill payable at another town, taken by the holder without the assent of the drawer, would discharge the drawer" (see opinion of Best, J.); and that such acceptance would be a material departure from the bill, if it affected the question of time in making demand and giving notice to the drawer and indorsers. The same principle is asserted in the case of Walker *v.* The Bank of the State of New York.[1]

It is the right of the drawer or indorser of negotiable paper to have it presented to the acceptor or maker for payment at his place of residence, unless it is on the face of the paper originally made payable at some specific place, with the single exception made and allowed in the case of the Troy City Bank *v.* Lauman, Spies *v.* Gilmore,[2] Anderson *v.* Drake, Taylor *v.* Snyder.

The bill of exchange in this case was not properly presented for payment at the Bank of Upper Canada, Port Hope, so as duly to protest it for non-payment, as against the drawers; but it should have been presented personally to the acceptor at Cobourg. It not having been so presented and notice of non-payment duly given, the drawers were not properly charged by the notice given, and are not liable on the bill.

This view of the plaintiff's rights as shown at the trial being con-

[1] 13 Barb. 636. [2] 1 Comst. 321.

clusive of the case, it is unnecessary to examine the other questions presented. The judgment should be reversed, and a new trial granted.

New trial granted, with costs to abide the event.[1]

THE BANK OF RED OAK *v.* ORVIS AND ANOTHER.

IN THE SUPREME COURT, IOWA, JUNE TERM, 1876.

[*Reported in* 42 *Iowa Reports*, 691.]

ACTION upon a promissory note against the makers and indorsers thereof, and to foreclose a mortgage securing the note. The cause was submitted to the court without a jury, and, upon the facts found, which were reduced to writing and filed, a judgment was rendered for plaintiff. Defendant appeals.

F. M. Davenport and *Z. T. Fisher*, for appellants.

John F. Lacey, for appellee.

BECK, J. It is first insisted that the evidence fails to show a demand upon the makers. We think the evidence sufficiently supports the finding of the court to the effect that the demand was made at the place of residence, the home, of both makers. One was not at home; but, as the demand was made at his house, and he had no place of business, it was sufficient.[2] 1 Parsons on Notes and Bills, 423.[3]

[1] Myers *v.* Standart, 11 Oh. St. 29 (*semble*), *accord.* — ED.

[2] See Brown *v.* McDermott, 5 Esp. 265; Stivers *v.* Prentice, 8 B. Mon. 461; Lanusse *v.* Massicot, 8 Mart 261; Shamburgh *v.* Commagère, 10 Mart. 18; Miltenberger *v.* Spaulding, 33 Mo. 421; Moodie *v.* Morrall, 1 Mill, C. R. 367, *accord.*

If the residence of the drawee or maker is closed, or if the drawee or maker is away from home, having left no agent to act for him, no further presentment is necessary. Greatrake *v.* Brown, 2 Cranch, C. C. 541; Ogden *v.* Cowley, 2 Johns. 274; Belmont Bank *v.* Patterson, 17 Oh., 78. — ED.

[3] Only so much of the case is given as relates to the question of presentment. — ED.

SECTION I. — *Continued.*

Presentment for Payment and Acceptance — (continued).

(*d*) By whom Presentment should be made.

OCEAN NATIONAL BANK *v.* LUCIEN B. WILLIAMS.

In the Supreme Judicial Court, Massachusetts, September Term, 1869.

[*Reported in* 102 *Massachusetts Reports*, 141.]

Contract on a draft drawn on J. H. Lyon & Brothers, a firm doing business in the city of New York, by the defendant, payable to his order, and by him indorsed to the plaintiffs. J. H. Lyon & Brothers accepted the draft payable at the Grocers' Bank in said city.

At the trial in the Superior Court, before Reed, J., there was evidence tending to show that William R. DeWolf, a clerk of John Hopper, a notary public, made presentment and a demand for payment of the draft at the Grocers' Bank, on the day on which it became due. DeWolf testified that he knew of no other presentment or demand for payment, and none other was shown. He also testified "that it was the custom in the city of New York for the clerks of notaries to present and demand payment of drafts, and for the notary to protest upon such presentment and demand, if payment was refused; and that in this case he filled the notice of protest and mailed it, the signature of the notary thereto being printed upon the blank notice."

This notice, which was introduced in evidence, was as follows: —

"United States of America, State of New York, ss. I, John Hopper, notary public, duly commissioned and affirmed, dwelling in the city of New York, do hereby certify that on the 12th day of January, in the year of our Lord one thousand eight hundred and sixty-one, at the request of the Ocean Bank of the city of New York, the original draft hereunto annexed was duly presented at the Grocers' Bank to the paying teller, and demanded payment, which was refused. Whereupon I, the said notary, at the request aforesaid, did protest, and by these presents do publicly and solemnly protest, as well against the drawers, acceptors, and indorsers of the said draft, as against all others whom it doth or may concern, for exchange, re-exchange, and all costs, damages, and interest already incurred and to be hereafter incurred, for want of payment of the same, Thus done and pro-

tested in the city of New York, aforesaid, in the presence of John Doe and Richard Roe, witnesses. J. HOPPER,

"*In testimonium veritatis.* *Notary Public, Ocean Bank.*"

[Seal.]

William E. Boies testified "that he was a practising lawyer in the city of New York; that it was the custom for presentment and demand of payment of drafts to be made by notaries' clerks; that he knew of no difference in the custom, whether the bills were inland or foreign; and that his attention had never been called to the custom as to foreign bills particularly."

On this evidence, there being none other bearing upon the question of presentment, demand, and protest, the judge ruled that the action could not be maintained, ordered a verdict for the defendant, and reported the case for the determination of this court.

H. B. Stevens, for the plaintiffs.

A. L. Soule, for the defendant.

AMES, J. The draft declared upon, having been drawn by a person residing in this State upon persons residing in another State, is a foreign bill; and, in order to charge the drawer, it is necessary to show that it was duly and regularly protested for non-payment. The fact of non-payment, in such a case, can only be proved by protest, and cannot be supplied by witnesses, or in any other way.[1] Phœnix Bank *v.* Hussey,[2] Buckner *v.* Finley.[3] In this case, there seems to be no competent evidence of this essential fact. There is nothing on the face of the report, or in the terms of the notarial certificate, to indicate that the notary personally presented the draft for payment. It is true, he certifies that it was duly presented and payment demanded; but the report finds that the presentment and demand were made by the notary's clerk, and not by the notary himself, and that no other presentment or demand was in fact made. But it is well settled that, by the common law and according to the uniform practice of this Commonwealth, the duties of a notary must be performed by himself personally, and not by a clerk or deputy. Cribbs *v.* Adams.[4] No attempt was made at the trial to show that the general rule of law upon this point has been modified by any local statute of the State of New York; and, in the absence of all evidence to the contrary, we must presume the general commercial law of that State to be the same substantially with our own. The plaintiff wholly failed to prove

[1] See *supra*, p. 114, note 1, and also State Bank *v.* Hayes, 3 Ind. 400; Commercial Bank *v.* Barksdale, 36 Mo. 563; Commercial Bank *v.* Varnum, 49 N. Y. 269, *accord* — ED.

[2] 12 Pick. 488. [3] 2 Pet. 586. [4] 13 Gray, 597.

the existence of any well settled local usage [1] in New York, that would authorize a notary in the case of a foreign bill to make a presentment and demand of payment by his clerk or deputy, and to certify and authenticate notarial acts so performed, in the same manner as if he had performed them himself. The witnesses who testify that it is customary in the city of New York for the clerks of notaries to present and demand payment of drafts, and for notaries to protest upon such presentment and demand, wholly fail to give any information upon the point whether that custom applies to and includes the case of foreign bills. One of them says that his attention had never been called to that distinction, and the other makes no allusion to it. It hardly need be said that a local usage, in derogation of the general rules of law, requires clearer and better evidence of its existence and validity. *Judgment on the verdict.*[2]

[1] Evidence of a usage to present a foreign bill by a notary's clerk or deputy is deemed admissible. McClane *v.* Fitch, 4 B. Mon. 599; Chenowith *v.* Chamberlin, 6 B. Mon. 60; Bank of Kentucky *v.* Garey, 6 B. Mon. 626; Miltenberger *v.* Spaulding, 33 Mo. 421; Commercial Bank *v.* Varnum, 49 N. Y. 269; Carter *v.* Union Bank, 7 Humph. 548; Nelson *v.* Fotterall, 7 Leigh, 179. — Ed.

[2] Leftley *v.* Mills, 4 T. R. 170, 175 (*semble*); Sacrider *v.* Brown, 8 McL. 481; McClane *v.* Fitch, 4 B. Mon. 599 (*semble*); Chenowith *v.* Chamberlin, 6 B. Mon. 60; Bank of Kentucky *v.* Garey, 6 B. Mon. 626; Cribbs *v.* Adams, 13 Gray, 597; Carmichael *v.* Bank of Pa., 5 Miss. 567; Ellis *v.* Commercial Bank, 8 Miss. 294; Miltenberger *v.* Spaulding, 33 Mo. 421; Commercial Bank *v.* Barksdale, 36 Mo. 563; Commercial Bank *v.* Varnum, 49 N. Y. 269; Carker *v.* Union Bank, 7 Humph. 548; Locke *v.* Huling, 24 Tex. 311, *accord*.

See Atwell *v.* Grant, 11 Md. 101; Nelson *v.* Fotterall, 7 Leigh, 179; Poole *v.* Dicas, 1 B. N. C. 649; Sutton *v.* Gregory, Peake, Add. 150. Chitty, Bills, 9th ed. p. 459, note *z*, contains a correspondence between Mr. Chitty and the London and Liverpool notaries as to the propriety of presentment of a foreign bill by a notary clerk.

The formal protest must be drawn up by the notary himself. Sacrider *v.* Brown, 8 McL. 481. — Ed.

SECTION I. — *Continued.*

Presentment for Payment and Acceptance — (continued).

(e) To whom Presentment should be made.

BROWN v. TURNER.

In the Supreme Court, Alabama, January Term, 1849.

[*Reported in* 15 *Alabama Reports*, 882.]

Error to the County Court of Choctaw. Before the Hon. George F. Smith, J.

The facts of this case are stated in the opinion of the court.

J. A. Campbell, for plaintiff in error.[1]

Dargan, J. This was an action of assumpsit, on a bill of exchange, brought by the indorsee against the drawer. It is objected that the declaration does not show that payment was demanded of Austill & Marshall, the acceptors. The averment is "that, when said bill became due and payable, to wit, on the 12th day of November, 1844, to wit, in the city of Mobile, the said bill was presented, and shown by John A. Hitchcock, a notary public, to the agent of said Marshall, one of the firm of Austill & Marshall, both Austill and Marshall being absent from the city, and their partnership being dissolved, and payment thereof demanded."

We think the declaration shows a sufficient demand. It is said that, if the acceptance be by partners, then the presentment for payment should be made at their place of business, or at the dwelling of either of the partners. Story on Bills, § 362; Bayley on Bills, 285, 286.

A demand of payment of one is a demand of all;[2] nor can the dissolution of their partnership before the bill falls due vary the rule, or render it necessary that a separate demand should be made of each.[3] As both members of the firm were absent from the city, a demand of the agent of one is sufficient to charge the drawer.[4]

Let the judgment be reversed, and the cause remanded.

[1] The argument of counsel for the plaintiff in error, has been omitted, and also a portion of the opinion relating to a question of procedure, in which the courts reversed the judgment of the court below. — Ed.

[2] Mt. Pleasant Bank *v.* McLeran, 26 Iowa, 306; Shed *v.* Brett, 1 Pick. 401; Hunter *v.* Hempstead, 1 Mo. 67; Erwin *v.* Downs, 15 N. Y. 575, *accord.* — Ed.

[3] Greatrake *v.* Brown, 2 Cranch, C. C. 541; Crowley *v.* Barry, 4 Gill, 194; Fourth Bank *v.* Heuschen, 52 Mo. 207; Cayuga Bank *v.* Hunt, 2 Hill, 635; Gates *v.* Beecher, 60 N. Y. 518, *accord.* — Ed.

[4] Philips *v.* Astling, 2 Taunt. 206, *accord.* — Ed.

SECTION I. — *Continued.*

Presentment for Payment and Acceptance — (continued).

(*f*) MODE OF PRESENTMENT.

SAUNDERSON AND OTHERS *v.* JUDGE.

IN THE COMMON PLEAS, MAY 18, 1795.

[*Reported in 2 Henry Blackstone, 509.*]

THIS was an action on a promissory note, made by Sharp, to Wilkinson or order, who indorsed it to Judge, he to Sanders & Co., and Sanders & Co. to Saunderson & Co., bankers in Southwark, to cover acceptances which they had given on account of Sanders & Co. At the foot of the note, there was a memorandum by Sharp that he would pay it at the house of Saunderson & Co., with whom he had a cash account. Some time before the note became due, Sharp had absconded; and on the day when it was due Saunderson & Co. wrote by the post to Judge, giving him notice of the non-payment, and demanding payment of him, but there was no other evidence of the notice than the putting the letter into the post-office. They had made no previous demand on Sharp, not knowing where to find him, having directed several letters to him at his usual place of abode, which were returned with the post-mark upon them, denoting that no such person was to be found; and, believing him to be insolvent, as he had kept an account with them, but had then no effects in their hands. The declaration was in the usual form, by the indorsee against the indorser of a promissory note, without stating that it was to be paid at the house of Saunderson & Co. At the trial, the plaintiffs were nonsuited, on the ground that it was incumbent on them to prove an actual demand on the maker of the note. There was also a doubt raised as to the consideration; but nothing turned upon it.

A rule having been granted to show cause why there should not be a new trial, *Le Blanc*, Serjt., showed cause, contending that the nonsuit was proper: first, because the note was not presented to Sharp for payment by the plaintiffs, and therefore the averment in the declaration that it was so presented was not proved; and, secondly, because it was not proved that the defendant received the letter which was put into the post-office, advising him of the non-payment by Sharp.

Bond, Serjt., in favor of the rule, said: "that, as by the terms of the note the money was to be paid at the house of Saunderson & Co., it was

there that it was to be presented for payment. If Judge, instead of indorsing the note to Saunderson & Co., had there demanded payment of it himself, it would have been sufficient; but, as it was indorsed to Saunderson & Co., they could not make a demand upon themselves, and Sharp was nowhere to be found. As to the proof of the averment in the declaration that the note was presented to Sharp for payment, in all actions on bills of exchange and promissory notes, due diligence used by the holder to obtain payment from the acceptor of the one and the maker of the other is evidence to support the averment. With respect to the other objection, the putting of the letter to Judge into the post-office, the day when the note became due, was clearly evidence of notice to him.

PER CURIAM. It was no part of the contract in this case that the note should be paid at the house of Saunderson & Co., and therefore that was not necessary to be stated in the declaration. But the maker merely appointed the house of his banker as the place where he was to be called upon for payment, and where it would be paid. Yet this was both an undertaking that there should be cash there, and also an order to the bankers to pay it. It is not necessary that a demand should be personal: it is sufficient if it be made at the house of the maker of the note; and it is the same thing, in effect, if it be made at the place where he appoints it to be made. If Judge had been the holder of the note, it would have been enough for him to have presented it for payment at the house of Saunderson & Co. And, as they at whose house it was to be paid were themselves the holders of it, it was a sufficient demand for them to turn to their books and see the maker's account with them, and a sufficient refusal to find that he had no effects in their hands.[1] As to the notice to the defendant, the sending of the letter by the post was sufficient evidence of that notice.[2]

Rule absoluta.

[1] Bailey v. Porter, 14 M. & W. 44; U. S. Bank v. Smith, 11 Wheat. 171; Fullerton v. U. S. Bank, 1 Pet. 604; U. S. v. Carneal, 2 Pet. 543; Roberts v. Mason, 1 Ala. 373; Allen v. Miles, 4 Harringt. 234; Maurin v. Perot, 16 La. 276; Berkshire Bank v. Jones, 6 Mass. 524; Folger v. Chase, 18 Pick. 63; Graham v. Sangston, 1 Md 59; People's Bank v. Brooke, 31 Md. 7 (*semble*); Goodloe v. Godley, 21 Miss. 233; Nichols v. Goldsmith, 7 Wend. 160; Ogden v. Dobbin, 2 Hall, 112; Woodin v. Foster, 16 Barb. 146; Gillett v. Averill, 5 Den. 85; Bank of Syracuse v. Hollister, 17 N. Y. 46; Merchants' Bank v. Elderkin, 25 N. Y. 178; State Bank v. Flagg, 1 Hill (S. Ca.) 177; Lafayette Bank v. McLaughlin, 4 West. L. J. 76; State Bank v. Napier, 6 Humph. 270; Apperson v. Union Bank, 4 Coldw. 445, *accord*.

But the physical presence of a bill in the bank where it is payable, without the knowledge of the bank, does not constitute a presentment of the bill. Chicopee Bank v. Philadelphia Bank, 8 Wall. 641. — ED.

[2] Dobree v. Eastwood, 3 C. & P. 250; Pack v. Alexander, 3 M. & Sc. 789; Stocken v. Collin, 7 M. & W. 515; Woodcock v. Houldsworth, 16 M. & W. 124; Kufh v. Wee

CHEEK, GENT., v. ROPER.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 7, 1804.

[*Reported in 5 Espinasse*, 175.]

ASSUMPSIT on a bill of exchange against defendant as drawer.

The declaration stated in the usual form that the defendant drew his bill of exchange for £60 on one J. Hammond, tanner, in Bristol, which was duly shown and presented to the said Hammond for his acceptance, &c., who refused to accept or pay the same, by reason whereof the defendant became liable.

To prove the fact of the bill having been presented to Hammond for his acceptance, the plaintiff proved that the bill was sent by the witness, who was called, who carried it to the place which was described to him as Hammond's house: he offered it to some person in a tan-yard, who refused to accept it; but he did not know Hammond's person, nor could he swear that the person to whom he offered the bill was he, or represented himself to be so.

LORD ELLENBOROUGH said that the allegation respecting the bill was a material one, as the drawer could only become liable on the acceptor's default, which default must be proved. That the evidence here offered proved no demand on Hammond and was therefore insufficient, so that the plaintiff could not recover on the bill. Some evidence must be given of an application to the party first liable.[1]

ton, 3 Esp. 54; Knott *v.* Venable, 42 Ala. 186; Bell *v.* Hagerstown Bank, 7 Gill, 216; Munn *v.* Baldwin, 6 Mass. 316; Shed *v.* Brett, 1 Pick. 401; True *v.* Collins, 3 All. 438; Cabot Bank *v.* Warner, 10 All. 522 (*semble*); Shelburne Falls Bank *v.* Townsley, 102 Mass. 177; Renshaw *v.* Triplett, 23 Mo. 213; Ellis *v.* Comm. Bank, 8 Miss. 294; Miller *v.* Hackley, 5 Johns. 375; Mech. Bank *v.* Crow, 5 Daly, 191; Walker *v.* Stetson, 14 Oh. St. 89 (*semble*); Friend *v.* Wilkinson, 9 Grat. 31, *accord.* — ED.

[1] See Bank of Washington *v.* Triplett, 1 Pet. 25, 34; Wiseman *v.* Chiapella, 22 How. 368, 377.

In Bank of Washington *v.* Triplett, *supra*, Marshall, C. J., said (p. 34): "Absence [of the drawee] from home, with a failure to make provision for payment when a bill becomes due, is a failure to pay; but absence from home, when the holder of a bill or his agent offers it for acceptance, is in no respect culpable. . . . Had the bill, under such circumstances, been protested for non-acceptance, and returned, the drawer might not have been liable for it." In Wiseman *v.* Chiapella, *supra*, the court said, *per* Wayne, J. (p. 377): "In making a demand for an *acceptance*, the party ought, if possible, to see the drawee personally, or some agent appointed by him to accept; and diligent inquiries must be made for him, if he shall not be found at his house or place of business." — ED.

HINE v. ALLELY AND ANOTHER.

IN THE KING'S BENCH, APRIL 18, 1833.

[*Reported in* 4 *Barnewall & Adolphus*, 624.]

ASSUMPSIT by indorsee against drawers of a bill of exchange, dated 15th May, 1830, payable to themselves, at three months, directed to "Mr. Peter Perry, No. 6 Budge Row, Watling Street," and accepted by him. Averment, that on the 18th of August, 1830, the said bill was presented and shown to the said Peter Perry for payment; and he then and there had notice of the indorsement, &c., and was requested to pay, but would not, of which the defendants had notice. Plea, the general issue. At the trial before Parke, J., at the sittings in Middlesex after last Hilary term, it appeared that on the day the bill became due it was taken to No. 6 Budge Row, to be presented on behalf of the plaintiff; but the house was shut up, and no further presentment could be made. On the same day, the bill was shown to the defendants, and notice given them of the dishonor. No other notice appeared to have been given within proper time. It was objected, upon this evidence, that the averment in the declaration that the bill was presented and shown to Perry was not made out, though, if the declaration had said "duly presented" only, the proof might have been sufficient. Parke, J., thought there was a presentment, and that the rest of the averment might be rejected as surplusage. It was further objected that the only notice proved was given to the drawers on the day the bill became due; whereas, the whole of that day ought to have been allowed them for payment. Parke, J., overruled this objection also; and a verdict was found for the plaintiff, but leave given to enter a nonsuit.

Erle now moved accordingly, and restated the objections. [PARKE, J. As to the first, Hardy *v.* Woodrooffe[1] is in point.] At all events, the notice on the 18th was premature. Burbridge *v.* Manners may be cited in answer, but there Lord Ellenborough said, "I think the note was dishonored as soon as the maker had refused payment on the day when it became due." Here the holder only concluded that the bill would not be paid from finding no one at the house. There had been no refusal.

PER CURIAM.[2] It is the same, if the house is shut up and no one there.[3] Both cases are in point. *Rule refused.*

[1] 2 Stark. 319.

[2] Denman, C. J., Littledale, Parke, and Patteson, JJ.

[3] Buxton *v.* Jones, 1 M. & Gr. 83; De Wolfe *v.* Murray, 2 Sandf. 166; Pierce *v.* Struthers, 27 Pa. 249; 30 Pa. 189; Struthers *v.* Kendall, 41 Pa. 214, *accord*.

See *supra*, p. 134, note 8. — ED.

ALBERT K. BARNES *v.* DANIEL W. VAUGHAN.

IN THE SUPREME COURT, RHODE ISLAND, SEPTEMBER TERM 1859.

[*Reported in* 6 *Rhode Island Reports*, 259.]

ASSUMPSIT against the defendant as the indorser of two promissory notes for $600 each, made by one Nelson C. Northup, and payable, one in thirty-six, and the other in seventy-four months after date, to the order of the defendant, and by him indorsed to the plaintiff.

At the trial before the court, to whom the case was submitted in fact and law, under the general issue, it appeared that the notes, which were not made payable at any particular place, had been left by the plaintiff at the Mount Vernon Bank in Foster for collection; and that the only demand of payment made upon Northup, the maker, was by the usual printed bank notice, mailed to him by the cashier of the bank, and directed to him at Providence, where he lived, in the early part of the months in which they respectively fell due, although at what times precisely the cashier of the bank could not recollect. Due notice of non-payment by the maker was proved to have been given to the defendant.

Bartlett, for the plaintiff.

Burgess & Brownell, for the defendant.[1]

BOSWORTH, J. The defence to this suit is that no legal and proper demand was made on the maker of the note; and that therefore the indorser, who is here sued, is discharged. The rule of the common law is that, in order to charge the indorser, demand must be made on the maker for payment on the very day on which the note becomes due. In case the note on its face is made payable at a particular place, as at a bank named, it is necessary, and only necessary, to make demand at such place; but, if no place of payment is named in the note at which the note is payable, it is necessary to present the note to the maker personally, or at his place of abode or business, before the indorser can be made chargeable. In this case, no place of payment was mentioned in the notes. The notes were left at the Mount Vernon Bank for collection; and it is agreed that the maker had notice before the day of payment that they were there for that purpose. This notice could not avail to make the notes payable at said bank. The maker had not by the terms of his contract agreed to pay the notes at that bank; and a demand there was no demand upon him.

[1] The arguments of counsel containing little more than a citation of authorities have been omitted. — ED.

It was necessary that demand should be made upon him personally, or at his dwelling or place of business, on the last day of grace. No such demand was made, and the indorser, therefore, was never charged.

Judgment must therefore be rendered for the defendant for his costs.[1]

JOSIAH C. ARNOLD v. HENRY DRESSER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1864.

[*Reported in* 8 *Allen*, 435.]

CONTRACT against the indorser of a joint promissory note.

At the trial in the superior court, before Morton, J., it appeared that on the day when the note became due, Theodore S. Stratton, in behalf of the plaintiff, demanded payment thereof of the two promisors, but did not have the note in his possession at the time, and the note was not paid. The plaintiff testified that on the same day he called upon the defendant, and gave notice to him that demand had been made on the makers; that one of the makers called during the interview, and both he and the defendant said that the note should be paid soon.

Upon this evidence, the judge ruled that the plaintiff was not entitled to recover, and directed a verdict for the defendant, which was accordingly rendered, and the plaintiff alleged exceptions.

H. W. Bishop, for the plaintiff.

J. E. Field, for the defendant.

[1] Farmers' Bank v. Duvall, 7 Gill & J. 78; Moore v. Waitt, 13 N. H. 415; Stuckert v. Anderson, 8 Whart. 116; Halls v. Howell, Harp. 426; Gillespie v. Hannahan, 4 McC. 503.

"Under the long-established practice of the banks of Massachusetts, to issue notices to promisors, on the stated day of payment, without grace, or a few days previous informing them that the note is in such bank, that it will be payable on a day named, being the last day of grace, and requesting the promisor to come to the bank and pay it; if the note is in fact in such bank, and remains unpaid till the close of usual bank hours on that day, it has been held to be dishonored, and notice may then be given to the indorser." *Per* Shaw, C. J., in Mechanics' Bank v. Merchants' Bank, 6 Met. 24.

See also Whitwell v. Johnson, 17 Mass. 449; Grand Bank v. Blanchard, 23 Pick. 305; Warren Bank v. Parker, 8 Gray, 221, *accord*.

The same rule obtains in Maine. Gallagher v. Roberts, 11 Me. 489; Maine Bank v. Smith, 18 Me. 99.

The forwarding of a bill by the holder to the drawee, with a request of payment, has been held to constitute a due presentment. Bond v. Warden, 1 Coll. 583; Bailey v. Bodenham, 16 C. B. N. S. 288 (*semble*); Prideaux v. Criddle, L. R. 4 Q. B. 455; Carmichael v. Bank of Pa., 5 Miss. 567. See Dale v. Lubbock, 1 Barnard. 199. See Farwell v. Curtis, 3 Cent. L. J. 352. — ED.

BIGELOW, C. J. The defendant is not liable as indorser of the note declared on. In order to charge him, it was necessary for the plaintiff to show due presentment and demand of the note on both the promisors;[1] Union Bank of Weymouth, &c., v. Willis, or a waiver thereof by the defendant. There were no such presentment and demand. If a note is made payable at a particular place, the holder must have it at that place on the day of its maturity, in order to make due presentment; if it is not payable at a designated place, the note must be presented to the promisor at his usual place of business or at his dwelling-house. But no valid presentment and demand can be made by any person without having the note in his possession at the time, so that the maker may receive it in case he pays the amount due, unless special circumstances, such as the loss of the note or its destruction, are shown to excuse its absence.[2] Shaw v. Reed,[3] Freeman v. Boynton.[4]

Nor was there any waiver of due demand by the defendant. No such waiver is made, where an indorser promises to pay the note in ignorance of the fact that he has been discharged by the laches of the holder, in not making due demand of the promisor, or where such promise is made under a misapprehension or mistake of facts concerning the due presentment and demand of the note. Low v. Howard,[5] Kelley v. Brown.[6] In the case at bar, the defendant made the statement on which the plaintiff relies to show a waiver, not only in ignorance of the fact that the note had not been duly demanded of one of the promisors, but under a mistaken belief that it had been so demanded, induced by the false statement to that effect made to him by the plaintiff. *Exceptions overruled.*

[1] Blake v. McMillen, 33 Iowa, 150; 22 Iowa, 358; Nave v. Richardson, 36 Mo. 130; Willis v. Green, 5 Hill, 232, 234 (*semble*); Gates v. Beecher, 60 N. Y. 518, 523 (*semble*); Greenough v. Smead, 3 Oh. St. 415 (qualifying Harris v. Clark, 10 Oh. 5), *accord*. — ED.

[2] Musson v. Lake, 4 How. 262; Montgomery Bank v. Gaffney, 9 Ala. 153 (but see Posey v. Decatur Bank, 12 Ala. 802); Lockwood v. Crawford, 18 Conn. 361; Warren v. Briscoe, 12 La. 472; Nott v. Beard, 16 La. 308; Nailor v. Bowie, 3 Md. 251; Freeman v. Boynton, 7 Mass. 483; Shaw v. Reed, 12 Pick. 132; Fall River Bank v. Willard, 5 Met. 216; Smith v. Gibbs, 10 Miss. 479; Draper v. Clemens, 4 Mo. 52; Bank of Vergennes v. Cameron, 7 Barb. 143; Etheridge v. Ladd, 44 Barb. 69; Crandall v. Schroeppel, 1 Hun, 557; Ocean Bank v. Fant, 50 N. Y. 474, *accord*.
Tredick v. Wendell, 1 N. H. 80, *contra*.
Conf. Kenworthy v. Hopkins, 1 Johns. Cas. 107. — ED.

[3] 12 Pick. 132.
[4] 7 Mass. 483.
[5] 11 Cush. 268.
[6] 5 Gray, 108.

A. LANGENBERGER, L. BLOCHMAN, J. CERF, AND B. DREYFUS v. H. KROEGER.

IN THE SUPREME COURT, CALIFORNIA, APRIL, 1874.

[*Reported in* 48 *California Reports*, 147.]

BY THE COURT, CROCKETT, J.[1] The defendant, residing at Anaheim, made and delivered to one Smith, for the plaintiffs, a draft on Leopold Kahn, of San Francisco, for six hundred and twenty-two dollars, payable to the order of the plaintiffs, but specified no particular kind of money in which it was to be paid. On receiving the draft, Smith, without the authority of the defendant, and, so far as the evidence shows, without the knowledge or authority of the plaintiffs, wrote across the face of it in red ink the words "Payable in United States gold coin." The court finds that, on receiving the draft at San Francisco, the plaintiffs presented it to Kahn, and demanded payment in gold coin, which he refused, but tendered payment in silver coin, which the plaintiffs declined to accept. Thereupon, the draft was delivered to a notary, who presented it to Kahn for payment, which was refused, and the draft was protested, of which the defendant was duly notified. There is nothing to show that payment was tendered to the notary in silver or currency, nor any direct evidence that he demanded payment in gold. All the direct evidence in respect to the demand and protest by the notary is contained in his official certificate, in which he states that he demanded payment, and that it was refused.

The action is to recover the amount of the draft; and, a judgment having been entered for the defendant, the plaintiffs appeal.

There was no evidence as to the nature or extent of Smith's agency for the plaintiffs; nor any tending to prove that, when they presented the draft for payment and demanded gold, they had any notice or information that the words across the face of the draft were written without the authority of the drawer. In the absence of all proof on the point, it cannot be inferred that Smith was acting within the scope of his agency, in writing these words across the draft, and the plaintiffs are not bound by or responsible for his unauthorized act, unless they subsequently adopted and ratified it, with a knowledge of all the facts; and there was no proof of such ratification. It was, therefore, the unauthorized act of a stranger, having no interest in the transaction, and did not vitiate the draft. But, in order to hold the

[1] All that is material to an understanding of the case being contained in the judgment of the court, the rest of the case has been omitted. — ED.

drawer, it was incumbent on the plaintiffs to make a proper demand of payment, and to give due notice of non-payment. As the draft specified no particular kind of money in which it was payable, it might have been paid in legal tender notes; and it was not competent for either of the parties to prove by parol that it was understood and agreed that it should be paid either in gold or silver. To admit such evidence would be to contradict or vary the written instrument; and proof of a mercantile usage cannot supersede a positive rule of law. The drawee was, therefore, at liberty to pay the draft in legal tender notes; and, if the plaintiffs demanded payment in gold only, this was not a sufficient demand. They were authorized to demand payment according to the tenor of the draft, and not otherwise; and, if the demand was limited to gold coin, it was not sufficient to hold the drawer. It is said, however, that it appears from the certificate of the notary that he demanded payment generally; and that the presumption is he performed his duty, and demanded payment according to the tenor of the draft, disregarding the words, "Payable in United States gold coin," written across the face of it. The finding on this point is not very satisfactory, and is to the effect that the draft was duly presented by the notary, and payment was demanded and refused, and notice duly given; and then the court adds, but there is no evidence that he notified the payee (meaning doubtless the drawee) to disregard the words, "Payable in United States gold coin," or that he did not demand gold coin. In effect, this is a finding that, in the opinion of the court, the demand by the notary was for gold coin; a conclusion which, we think, was justified by the evidence. The plaintiffs demanded payment in gold, and now assert in their complaint that such was the understanding of the parties; and, when payment in that currency was refused, they placed the draft in the hands of the notary, without instructions, so far as the proof shows, in respect to the nature of the demand he was to make. Finding the words "Payable in United States gold coin" written across the face of the draft, he doubtless concluded, and very naturally, that they were placed there by the authority of the drawer. The plaintiffs, believing they were entitled to demand gold, had declined to accept payment in silver; and it is altogether improbable that they would have received legal tender notes, which were still less valuable. Under these circumstances, there is a strong presumption that the notary was instructed to demand gold. But, if he had no instructions except to demand payment, it could not reasonably be inferred that he disregarded the words written across the face of the draft. In the absence of evidence to the contrary, the presumption is he demanded payment according to the face of the draft, which was apparently payable in gold coin. A

demand of this character by the notary was not more effectual to charge the drawer than a similar demand by the plaintiff. The vice of the demand is that it is not in accordance with the tenor of the draft, as drawn by the maker; and, in the absence of a proper demand, there is nothing to charge the drawer.

Judgment and order affirmed.[1]

[1] Conf. Eastman v. Turman, 24 Cal. 379; Chase v. Evoy, 49 Cal. 467; Gregg v. George, 16 Kas. 546. — Ed.

By the custom of merchants the drawee is entitled to 24 hours in which to decide whether to accept a bill or not. Accordingly, if he desires the time, the holder should leave the bill with him for this period. Bellasis v. Hester, 1 Ld. Ray. 280; Ingram v. Forster, 2 Smith, 243; Bank of Van Diemen's Land v. Victoria Bank, L. R. 3 P. C. 526; Wilcox v. Beal, 3 La. An. 481; Case v. Burt. 15 Mich. 82; Overman v. Hoboken, 31 N. J. 568; Montgomery Bank v. Albany Bank, 8 Barb. 399; Connelly v. McKean, 64 Pa. 113. See also Mitchell v. De Grand, 1 Mas. 176. — Ed.

SECTION II.

Notice of Dishonor.

(a) What the Notice must contain.

SOLARTE and Others v. PALMER and Another.

In the House of Lords, June 17, 1834.

[*Reported in* 1 *Bingham's New Cases*, 194.]

This was an action by the holders against the indorsers of a bill of exchange for £683, drawn the 25th of April, 1825, by Joseph Keats on, and accepted by, Daniel, Jones, & Co., payable at Williams, Burgess, & Co.'s, eight months after date.

Payment having been refused by the acceptors when the bill became due, the attorneys of the holders wrote to Palmer and Bouch, the indorsers, as follows: —

"Gentlemen, — A bill for £683, drawn by Mr. Joseph Keats upon Messrs. Daniel, Jones, & Co., and bearing your indorsement, has been put into our hands by the assignees of Mr. J. R. de Alzedo, with directions to take legal measures for the recovery thereof, unless immediately paid to, gentlemen, your obedient servants,

J. and S. Pearce."

At the trial of the cause before Lord Tenterden, the only question was, whether this letter amounted to notice of the dishonor of the bill, without which notice the indorser would not be responsible. Upon that point, Lord Tenterden felt himself bound at Nisi Prius by the decision in Hartley *v.* Case,[1] where it was held that a notice of the dishonor of a bill of exchange must contain an intimation that payment of the bill had been refused by the acceptor, and, therefore, that a letter merely containing a demand of payment was not a sufficient notice. However, observing that the sum was large and the question of importance, he suggested that the defendant might tender a bill of exceptions, as the readiest mode of obtaining the opinion of the highest tribunal.

A bill of exceptions was tendered and sealed accordingly, and argued in the Court of Exchequer Chamber, when that court unanimously confirmed the authority of Hartley *v.* Case, and held that a

[1] 4 B. & C. 339.

letter demanding payment and threatening proceedings at law did not amount to notice of the dishonor of the bill. See 7 Bingh. 530.

From this decision, an appeal was made to the House of Lords, and, the judges being summoned to hear the argument,

F. Pollock and *R. V. Richards*, for the plaintiff, contended that too much weight had been ascribed in the Exchequer Chamber to the authority of Hartley *v.* Case, a decision which was at variance with the opinions and practice of all commercial men. There was no settled form prescribed for giving notice of the dishonor of a bill; and, when the holder threatened to proceed at law against the indorser unless the bill were paid, it was a necessary inference that the bill had been dishonored. In Tindal *v.* Brown,[1] Buller, J., said that a notice of this sort "must import that the holder considers the indorser as liable, and expects payment from him." Such was the import of the plaintiff's notice; and it was, therefore, a sufficient notice of dishonor. Bayley on Bills, 4th ed. 206.

Whately, for the defendants, was stopped; and

PARK, J., declared the unanimous opinion of the judges present,[2] that the letter of the plaintiff's attorneys did not amount to notice of the dishonor of the bill, as such a notice ought, in express terms or by necessary implication, to convey full information that the bill had been dishonored. The following day

LORD BROUGHAM, C., said the judgment of the court below must be affirmed with costs not exceeding £350, on the ground that, after the decision of Hartley *v.* Case, and the sanction given to the authority of that decision by the unanimous judgment of the Court of Exchequer Chamber and the fifth edition of Bayley on Bills, the present case was too clear for an appeal. *Judgment affirmed.*[3]

[1] 1 T. R. 167.

[2] Williams, Bolland, Alderson, BB., Patteson, Taunton, Littledale, Vaughan, Gaselee, Park, JJ.

[3] In Hartley *v.* Case, 4 B. & C. 339; Boulton *v.* Welsh, 3 B. N. C. 688 (*overruled*); Phillips *v.* Gould, 8 C. & P. 355 (*semble*); Strange *v.* Price, 10 A. & E. 125; Messenger *v.* Southey, 1 M. & G. 76; Furze *v.* Sharwood, 2 Q. B. 388; Klockenbaum *v.* Pierson, 16 Cal. 375; Littlehale *v.* Maberry, 43 Me. 264; Union Bank *v.* Humphreys, 48 Me. 172; Page *v.* Gilbert, 60 Me. 485; Graham *v.* Sangston, 1 Md. 59; Manning *v.* Hays, 6 Md. 5 (*semble*); Armstrong *v.* Thruston, 11 Md. 148; Gilbert *v.* Dennis, 8 Met. 495; Pinkham *v.* Macy, 9 Met. 174; Dole *v.* Gold, 5 Barb. 490; Arnold *v.* Kinloch, 50 Barb. 44; Townsend *v.* Lorain Bank, 2 Oh. St. 345; Etting *v.* Schuylkill Bank, 2 Barr, 355; Sinclair *v.* Lynah, 1 Speers, 244, the notices were held not to contain a sufficient intimation of the fact of dishonor.

Similarly, a misstatement in the notice as to the time of the presentment of a bill or note which was in fact duly presented will not vitiate the notice, if the party to be charged could not fairly be misled by the mistake. Journey *v.* Pierce, 2 Houst. 176.

WOODTHORPE v. LAWES.

In the Exchequer, Michaelmas Term, 1836.

[*Reported in* 2 *Meeson & Welsby*, 109.]

The declaration stated that on the 6th of May, 1836, in consideration that the plaintiff, at the request of the defendant, would take a bill of exchange, accepted by one J. Watson, for the sum of £31 3*s*., being the amount due to the plaintiff on his acceptance of £——, without any indorsement from or by the defendant, he, the defendant, promised and guaranteed to the plaintiff the regular payment of the said bill when due; that the plaintiff did receive and take from the defendant, and without any indorsement thereof by him, a bill of exchange drawn by one G. Millen upon and accepted by the said J. Watson, payable to the order of the said G. Millen three months after date, for the said sum of £31 3*s*., being the bill mentioned and referred to in the said promise and guarantee of the defendant. The declaration then averred presentment to Watson, and non-payment by him, and notice thereof to the defendant, and alleged as a breach the non-payment by him of the amount of the bill.

Pleas: first, that the bill was not presented to Watson for payment; secondly, that no notice of its non-payment was given to the defendant; thirdly, that due notice of its non-payment by the acceptor was not given to Millen, the drawer. The plaintiff took issue on the first two pleas, and alleged in reply to the third that due notice was given to Millen, on which also issue was joined.

At the trial before Bolland, B., at the London sittings in this term, the plaintiff proved the presentment and dishonor of the bill, and also that, the day after it became due, the following letter was written by Mr. Rushbury, the plaintiff's attorney, to Millen, the drawer: —

"15 Fish Street Hill, 10 Aug., 1836.

"Sir, — A bill drawn by you upon, and accepted by, Mr. Joshua Watson, for £31 3*s*., due yesterday, is dishonored and unpaid; and I am desired to give you notice thereof, and to request that the same may be immediately taken up.

"I am, sir, &c.,

"H. D. Rushbury."

Crocker *v.* Getchell, 23 Me. 392; Ontario Bank *v.* Petrie, 3 Wend. 456; Tobey *v.* Lennig, 14 Pa. 483.

But see Routh *v.* Robertson, 19 Miss. 382; Wynn *v.* Alden, 4 Den. 168; Ransom *v.* Mack, 2 Hill, 587; Townsend *v.* Lorain Bank, 2 Oh. St. 345; Etting *v.* Schuylkill Bank, 2 Barr, 355, *contra*. — Ed.

On the same day, the following letter was also written and sent to the defendant: —

"SIR, — I beg to inform you that a bill of exchange by Joshua Watson for £31 3*s*., and due yesterday, is returned dishonored, and remains unpaid; and I am desired to give you notice thereof, and to request that you pay the same immediately.

"I am yours, &c.,

"H. D. RUSHBURY.

"15 Fish Street Hill, 10th Aug., 1836."

At the time these letters were written, the bill (indorsed in blank) was in Mr. Rushbury's hands, having been left at his office by the indorsee, to be presented for him.

Cresswell, for the defendant, objected that the notices thus given were insufficient, as they did not state who the holder was, or on whose part Mr. Rushbury applied, or where the bill was lying. The learned judge reserved the point, and the plaintiff had a verdict.

Cresswell now moved, pursuant to the leave reserved, for a rule *nisi* to enter a nonsuit. The notice of dishonor was insufficient. Mr. Rushbury, by whom it was sent, was no party to the bill; and he does not state that he applies in the name of any party to the bill. [PARKE, B. The bill being indorsed in blank, Rushbury was the holder. LORD ABINGER, C. B. If your objection be good, every notice of the dishonor of a bill lying at a banker's would be bad.] In Chapman *v.* Keane, it was held that the holder of a bill is entitled to avail himself of notice of dishonor given by any party to the bill; but here it is given by a party who, though in fact the holder of the bill, could have no title to sue the defendant, who is liable only on his guarantee to the plaintiff. [PARKE, B. *Prima facie*, Rushbury would have a legal right to the bill. I do not mean to say his right might not be qualified by proof that it was not intended that he should exercise it in the particular case. It is the same as if the bill had been sent to a banker.] The banker is more strictly the holder, because he enters the bill to the credit of the customer. [BOLLAND, B. No: it is entered short.]

LORD ABINGER, C. B. I really think there is no ground for the application.

The rest of the court concurred. *Rule refused.*[1]

[1] Mills *v.* U. S. Bank, 11 Wheat. 431; Gillespie *v.* Neville, 14 Cal. 408; Shrieve *v.* Duckham, 1 Litt. 194; Howe *v.* Bradley, 19 Me. 31; Bradley *v.* Davis, 26 Me. 45; Shed *v.* Brett, 1 Pick. 401, *accord*.

See Rowlands *v.* Springett, 14 M. & W. 7.

But a written notice of dishonor unsigned by any one is nugatory. Klockenbaum Pierson, 16 Cal. 375; Walker *v.* State Bank, 8 Mo. 704.

Conf. Maxwell *v.* Brain, 10 Jur. N. S. 777. — ED.

HEDGER v. STEAVENSON.

In the Exchequer, Hilary Term, 1837.

[*Reported in* 2 *Meeson & Welsby*, 799.]

Assumpsit. The declaration stated that one Samuel Thompson, on the 10th day of August, 1835, made his promissory note in writing, and thereby promised to pay to the order of the defendant, at Messrs. Barclay, Tritton, & Barclays', London, two months after the date thereof, £99 18*s.* for value received, which period had at the time of the commencement of this suit elapsed, and then delivered the said note to the defendant, and the defendant then indorsed the said note to the plaintiff, and then promised to pay the same according to the tenor and effect thereof. But the said Messrs. Barclay, Tritton, & Barclays did not, nor did the said Samuel Thompson, nor the defendant, or any other person, pay the said note, although the said note was presented at the said Messrs. Barclay, Tritton, & Barclays on the day when it became due, of which the defendant then had notice. There was also a count upon an account stated.

The defendant pleaded several pleas, and amongst others that the defendant had not due notice of the non-payment of the said note in the said first count mentioned, in manner and form as the plaintiff in the above in his said first count in that behalf alleged, and of this, &c.

At the trial before Parke, B., at the London sittings in this term, the plaintiff, in order to prove notice of dishonor, put in a letter from the plaintiff's attorney to the defendant, of which the following is a copy:—

"London, 30 Broad Street Buildings,
"14th October, 1835.

"Sir,—I am desired by Mr. Hedger to give you notice that a promissory note for £99 18*s.*, payable to your order two months after the date thereof, became due yesterday, and has been returned unpaid; and I have to request you will please remit the amount thereof, with 1*s.* 6*d.* noting, free of postage, by return of post.

"I am, &c., Jones Spyer."

It was objected by the defendant's counsel that this was not a due notice of dishonor; but the learned judge overruled the objection, and the plaintiff obtained a verdict.

W. H. Watson, on a former day in this term, obtained a rule to show cause why the verdict should not be entered for the defendant on the above ground.[1]

[1] The arguments of counsel have been omitted, and also a portion of the opinion of Parke, B., relating to a question of pleading. — Ed.

Humfrey and *Hoggins* now showed cause.

W. H. Watson, in support of the rule.

PARKE, B. I am of opinion that the rule ought to be discharged. The first question, which is one of considerable importance, is whether there is a sufficient notice of dishonor. The law upon this point is established by the decision in Solarte *v.* Palmer, which confirmed that of Hartley *v.* Case, against the previous opinion of the profession. It is certain that, after the case of Tindal *v.* Brown,[1] there was an impression that it was sufficient if the notice conveyed an intimation that the party to whom it was given was looked to for payment of the bill or note. Hartley *v.* Case first made an alteration in the law, and decided that the view so taken was not correct. The rule there laid down by Lord Tenterden was that, though no precise form of words was necessary to be used in giving notice of dishonor, yet the language employed must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor. Upon the authority of that case, the Court of Exchequer Chamber and the House of Lords decided Solarte *v.* Palmer, and held the notice there used insufficient. By that decision we are bound, though I am not prepared to say that I am bound by all the reasoning or language of the learned judges in giving their opinion, and therefore should myself doubt whether we could go so far as to say that it ought to appear upon the face of the instrument, "by express terms or necessary implication, that the bill was presented and dishonored:" it seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor, and not paid by him. However, supposing that we are bound by the precise expression of Tindal, C. J., in delivering judgment in the Exchequer Chamber, we ought not to put a strict construction on the term "necessary implication;" for, were we to do so, it would be difficult for any mercantile man to conduct business without the constant aid of a solicitor. We must not put such a meaning on that expression as to say that the language of the instrument must be so precise as to exclude the possibility of any other inference than that the bill had been so presented and returned unpaid. On the subject of the term 'necessary implication," Lord Eldon says: "Necessary implication means not natural necessity, but so strong a probability that an intention contrary to that which is imputed cannot be supposed." Wilkinson *v.* Adam.[2] If we adopt such a rule of construction in the present case, could any doubt be entertained by any mercantile man who received this notice that the note had been presented to the maker when due, and was not honored? Look at the language of the

[1] 1 T. R. 167.

[2] 1 Ves. & Bea. 466.

notice: "I am desired to give you notice that a promissory note made by Samuel Thompson for £99 18*s.*, payable to your order, became due yesterday, and has been returned unpaid. I have to request you will remit the amount thereof, with 1*s.* 6*d.* noting." It states the time when the note became due, and that it had been returned unpaid. Can any one doubt the use of the term "returned unpaid"? The word "returned" is almost a technical term in matters of this nature, and means that the bill has come to maturity, has been presented, and has not been paid. Upon reading this notice, I should say that it appears from it, by necessary implication (in the meaning I attach to the term), that the note has been duly presented and dishonored. This is the opinion which I should have formed previously to the case of Boulton *v.* Welsh, and we are not called upon to overrule that case without some authority to the contrary. The notice in Grugeon *v.* Smith was in the same terms as the present; and, as we must determine to which of the two cases we will subscribe, I must say I think that the one in the Common Pleas was not rightly determined. There is, indeed, one circumstance mentioned in this notice of dishonor, which does not appear in the notice in Boulton *v.* Welsh; viz., that the bill had been noted: that constitutes a distinction between the two cases; but I disclaim to go on that distinction. In Solarte *v.* Palmer, it was contended that there was no intimation that the bill had been presented for payment, or that it was unpaid, or even that it was due; and the argument for the sufficiency of the notice rested on the authority of Tindal *v.* Brown, — on its containing sufficient information that the party was held liable to the holder. In the present case, I think no mercantile man, upon reading the notice, could possibly misunderstand its meaning; and therefore, on that ground, I think the rule to enter a verdict for the defendant ought to be discharged.

Bolland, B. I am of the same opinion. I think we ought not to construe an instrument of this nature too strictly; and provided it contain information that the bill has been dishonored, and that the party by whom it was given is considered liable, that is sufficient. Let us look at the circumstances by which matters of this nature are accompanied. Long acquainted as I have been with mercantile affairs, not only professionally, but practically, I for one do not feel inclined to clog these transactions with difficulties; nor will I do so, unless I am compelled by the authority of decided cases. Let us look at this case, and see whether any man who had been only a week conversant with business could have doubted that this instrument had been dishonored, and that he was held liable to pay the amount due upon it. In the first place, it is a returned note, an expression which is perfectly understood in the city of London to designate a note which has been

dishonored. Then the notice describes the note, gives the amount, and states it to have been due the day before; goes on to request that the defendant would remit the amount; and adds, further, that the writer claims 1*s.* 6*d.* for noting, which though he was not entitled to require, it was nevertheless some further information with respect to the note. Considering all the terms of the notice, I think that even the most unpractised man would be perfectly satisfied what had happened to the note.

ALDERSON, B. I am of the same opinion. The only conclusion to be drawn from the cases of Hartley *v.* Case and Solarte *v.* Palmer is this, that a notice of dishonor must not merely convey information that the party is held liable, but also that the note or bill has been dishonored. I agree with my brother Parke, that we are not bound by the strict words of the judges, if the term "necessary implication" is used by them in a strict sense. It must have that reasonable construction which is given in the judgment of Lord Eldon, cited by my brother Parke. In that view of the case, the requisites are fully satisfied by the terms of this notice: the presentment and dishonor are necessarily to be inferred from the words here used.

GURNEY, B. I do not think Boulton *v.* Welsh is governed by either of the cases of Hartley *v.* Case and Solarte *v.* Palmer; and we are fortified in our opinion that this notice is sufficient by Grugeon *v.* Smith, in which the terms of the notice were not so strong as in the present case.

PARKE, B. I may add that Lord Abinger, to whom I mentioned this case, had no doubt of the notice being sufficient.

Rule discharged.[1]

[1] In Grugeon *v.* Smith, 6 A. & E. 499; Houlditch *v.* Cauty, 4 B. N. C. 411; Stocken *v.* Collin, 9 C. & P. 658; Lewis *v.* Gompertz, 6 M. & W. 399; Shelton *v.* Braithwaite, 7 M. & W. 436; Rowlands *v.* Springett, 14 M. & W. 7; Robson *v.* Curlewis, 2 Q. B. 421; Chard *v.* Fox, 14 Q. B. 200; Armstrong *v.* Christiani, 5 C. B. 687; Metcalfe *v.* Richardson, 11 C. B. 1011; Edmonds *v.* Cates, 2 Jurist, 188; Everard *v.* Watson, 1 E. & B. 801; McFarland *v.* Pico, 8 Cal. 636; Eastman *v.* Turman, 24 Cal. 879; Denegre *v.* Hiriart, 6 La. An. 100; Lewiston Bank *v.* Leonard, 43 Me. 144; Wheaton *v.* Wilmarth, 13 Met. 422; Housatonic Bank *v.* Laflin, 5 Cush. 546; Spies *v.* Newberry, 2 Doug. (Mich.) 425; Burkam *v.* Trowbridge, 9 Mich. 209 (overruling Platt *v.* Drake, 1 Doug. 296, and Newberry *v.* Trowbridge, 4 Mich. 891); Smith *v.* Little, 10 N. H. 526; Burgess *v.* Vreeland, 4 Zab. 71; De Wolf *v.* Murray, 2 Sandf. 166; Cayuga Bank *v.* Warden, 1 Comst. 413; 2 Seld. 19; Cook *v.* Litchfield, 5 Seld. 279; Youngs *v.* Lee, 12 N. Y. 551; Beals *v.* Peck, 12 Barb. 245; Bank of Cape Fear *v.* Seawell, 2 Hawks, 560; Brewster *v.* Arnold, 1 Wis. 264, the notices were held to contain a sufficient intimation of the fact of dishonor. — ED.

KING v. BICKLEY.

In the Queen's Bench, June 9, 1842.

[*Reported in* 2 *Queen's Bench Reports*, 419.]

Assumpsit by indorsee against indorser of a bill of exchange for £50, alleging non-payment by the drawee, of which defendant had notice. Third plea, that defendant had not due notice of the non-payment. Issue thereon.

On the trial before Wightman, J., at the Middlesex sittings during Trinity term, 1842, the plaintiff proved that in due time after the bill was dishonored he sent a written notice to the defendant in the following terms:—

"I hereby give notice that a bill for £50 at three months after date, drawn by," &c., "upon and accepted by," &c., "and indorsed by you, lies at No. 6. Ely Place dishonored.

"Yours, &c. J. W. King.

"Mr. George Bickley."

It was objected on behalf of the defendant that, although the notice stated the bill to have been dishonored, it did not tell the defendant that the plaintiff looked to him for payment. The learned judge overruled the objection; and a verdict was entered for the plaintiff, leave being reserved to move to enter a verdict for the defendant, if the court should consider the notice of dishonor to have been insufficient.

M. Chambers in this term, June 1st, moved accordingly.[1] The notice did not tell the defendant that the plaintiff looked to him for payment. [Lord Denman, C. J. Did it show any other reason for giving him the information?] Buller, J., in Tindal *v.* Brown,[2] says: "The purpose of giving notice is not merely that the indorser should know the note is not paid, for he is chargeable only in a secondary degree; but, to render him liable, you must show that the holder looked to him for payment, and gave him notice that he did so." [Lord Denman, C. J. That *dictum* was not necessary to the decision, nor was it adopted by Lord Mansfield.] In Solarte *v.* Palmer, Tindal, C. J., says that the notice "should at least inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonored, and that the holder looks to him for payment of the amount." [Lord Denman, C. J. In the

[1] Before Lord Denman, C. J., Patteson, Williams, and Coleridge, JJ.

[2] 1 T. R. 167, 170.

House of Lords, Park, J., in declaring the opinion of the judges present when that case came on in error, said that "such a notice ought, in express terms or by necessary implication, to convey full information that the bill had been dishonored." He dropped the particular expression in the judgment below, on which you rely.] The language of Alderson, B., in Shelton v. Braithwaite,[1] implies that the fact is essential. *Cur. adv. vult.*

Lord Denman, C. J., now delivered the judgment of the court.

On the point in this case as to notice of dishonor, we have conferred with the other judges, and are of opinion that it is not necessary in express terms to inform the party whom it is intended to charge that he will be looked to for payment. We think that the sending notice of dishonor is in itself sufficient for that purpose.

Rule refused.[2]

HARRISON v. SAMUEL RUSCOE.

In the Exchequer, February 21, 1846.

[*Reported in* 15 *Meeson & Welsby*, 231.]

The judgment[3] of the court was now delivered by

Parke, B. This case was argued a few days ago before my brothers Alderson and Platt, and myself, at the present sittings, on showing cause against a rule for entering a nonsuit, upon a point reserved by Mr. Welsby, the recorder of Chester. The case is perfectly novel, there being no decision or authority in point.

The action was upon a bill of exchange drawn by the defendant, payable to his order, by the defendant indorsed to W. H. Vaughan,

[1] 7 M. & W. 436.

[2] Cooke v. French, 10 A. & E. 131; Furze v. Sharwood, 2 Q. B. 388; Chard v. Fox, 14 Q. B. 200; Lewis v. Gomperts, 6 M. & W. 399; Miers v. Brown, 11 M. & W. 372; Caunt v. Thompson, 7 C. B. 400; Bank of U. S. v. Carneal, 2 Pet. 543, Cowles v. Harts, 3 Conn. 516; Shrieve v. Duckham, 1 Litt. 194; Barstow v. Hiriart, 6 La. An. 98; Warren v. Gilman, 17 Me. 360; Graham v. Sangston, 1 Md. 59; Burgess v. Vreeland, 4 Zab. 71; Townsend v. Lorain Bank, 2 Oh. St. 345 (*semble*), *accord*.

Conf. Metcalfe v. Richardson, 11 C. B. 1011, and Furze v. Sharwood, *supra*; East v. Smith, 4 D. & L. 744. In East v. Smith, *supra*, Coleridge, J., said, p. 754: "There seems to be a distinction between the case of a party giving notice, who is not the holder of the bill, and a party who is. It may be that when the former gives a notice no inference arises that he looks to the party to whom it is addressed for payment; but that, when the holder himself gives a notice, it must mean that he looks to the party for payment." — Ed.

[3] All that is material to an understanding of the case being contained in this judgment, the rest of the case has been omitted. — Ed.

and by W. H. Vaughan to the plaintiff. The defendant pleaded that there was no notice of dishonor. The bill was, in the body of it, made payable in London: it became due on the 24th of April. On the 26th, an attorney at Chester, who acted for the plaintiff, gave notice of dishonor to the defendant, stating in his letter that he was requested by Vaughan to desire payment of the defendant's dishonored bill; but he swore that he was not authorized by Vaughan to give that notice, and that he gave it in a wrong name by mistake. The only question is whether this notice was sufficient; for we have already intimated our opinion that the notice was in sufficient time, whether it be considered as given by the plaintiff or Vaughan; and that it sufficiently referred to the bill in question, and notified its due presentment and non-payment.

Since the case of Chapman v. Keane, it must be considered as perfectly settled that a notice of dishonor need not be given by the holder, but that he may avail himself of notice, given in due time by any party to the bill. The decision in that case is referred to and adopted by Chancellor Kent [1] and Mr. Justice Story.[2] The former states the rule to be that the notice may be given by any one who is a party to the bill: the latter states it more fully, and says that the notice will be sufficient, although not given by the holder or his agent, if it comes from some person who holds the bill when it is dishonored, or is a party to the bill, or who would, on the same being returned to him, and after payment, be entitled to require reimbursement thereof.

The notice, by the terms of the rule as laid down by the Court of Queen's Bench, must be given in due time by the party to the bill, that is, in due time, if he himself were suing; and, consequently, the case of notice by a party who had himself been already discharged by the laches of the holder is excluded. So, the terms of the rule as laid down by Mr. Justice Story seem to exclude the case of a party to the bill, who could not himself sue upon it on paying the amount of the bill; at least, they must be so understood, otherwise the mischief would happen which was pointed out by Mr. Jervis, that there might be a bill with twenty indorsements, which the holder might retain twenty days after its dishonor, and then recover against the drawer on a notice then given to him by the first indorsee, which that indorsee himself could not do. Such a notice would not be in good time, if given by the first indorsee, and would therefore be bad, and not support an action by the last. The rule equally excludes the case of notice by an acceptor, who never could sue himself upon the bill after taking it up; and the instances in which a notice by an acceptor

[1] Commentaries, vol. 3, p. 108. [2] Bills of Exchange, § 304.

has been held good at Nisi Prius[1] are explained by Mr. Justice Bayley[2] on the supposition that in these the acceptor had a special authority to do so. But, in the present case, Vaughan, in whose name the notice was given, was not discharged by the laches of the holder at the time it was given, and a notice by him on the 26th would have been in sufficient time to support an action by him, and consequently an action by the plaintiff. There is, therefore, no objection to the notice on that ground; nor would there have been any, if the attorney had omitted to state on whose behalf he applied. It was so held in Woodthorpe v. Lawes, and had been previously laid down in Chancellor Kent's Commentaries (vol. 3, p. 108), who says that any agent in possession of the bill may give the notice, and it need not state at whose request it was given, nor who was the owner of the bill.

It remains, therefore, to consider what is the effect of giving an untrue description of the party on whose behalf it was given. This point has never been decided; for in Chapman v. Keane, the only case which bears upon it, the plaintiff's clerk, who gave the notice, must have been authorized by the nature of his employment to give it on behalf of the plaintiff, as he was, by the express authority of the holder, to give it for him; and the notice stated no untruth. Here there is an untrue statement, but made unintentionally, and by mere mistake.

There is, no doubt, a difference between the two cases, where a notice is given by an authorized person, without stating on whose behalf it is given, and where untrue information is afforded. In one case, the party is put on inquiry, if he thinks fit to make it; in the other, he is misinformed. What, then, ought to be the result of that misinformation? It is to be recollected that, whether the party is misled or not as to the person giving the notice, the great object of a notice is answered by the information of the dishonor of the bill, and the person to whom notice is given is thereby enabled to withdraw his effects from, or take his remedy against, the prior parties. And we think it reasonable to hold that the misrepresentation of the name of the person on whose behalf notice is given ought not wholly to avoid the notice, but only to place the party giving it in the same situation, as to the party to whom it was given, as if the representation had been true; and, therefore, the defendant ought to have every defence against the plaintiff that he would have had, if the notice had been really given by the party named; and this is in analogy with the law as to contracts with factors acting for concealed principals, and similar

[1] 1 Chitty, 227; 4 Campb. 87.

[2] Bayley on Bills, ed. 1830, ch. 7, § 2, p. 254, &c.

PAUL, PUBLIC OFFICER OF STUCKEY'S SOMERSETSHIRE BANKING COMPANY v. JOEL.

IN THE EXCHEQUER CHAMBER, FEBRUARY 8, 1859.

[*Reported in 4 Hurlstone & Norman*, 855.]

THIS was an appeal against the judgment of the Court of Exchequer, discharging a rule to enter the verdict for the defendant pursuant to leave reserved at the trial (reported 3 H. & N. 455 [1]).

Hannen, for the defendant.[2] Solarte *v.* Palmer is a direct authority that this notice of dishonor is insufficient. That decision has never been reversed, Everard *v.* Watson;[3] and the principle there laid down is that a notice of dishonor must inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been presented for payment and dishonored. In this case there is nothing to intimate to the defendant that the bill has been presented, unless the mere fact of the notice being given leads to that inference. Where a party has neglected to present a bill, this is the very form of notice which he would give. Solarte *v.* Palmer was acted on in Strange *v.* Price.[4] Though the rule laid down in Solarte *v.* Palmer was somewhat qualified in Bailey *v.* Porter,[5] still a notice of dishonor must convey an intimation that the bill has been presented. Allen *v.* Edmund-

[1] The statement of the case in 3 H. & N. is as follows: "Declaration by indorsee against drawer of a bill of exchange, dated the 9th March, 1857, and accepted by one Bosville, for payment of £500 ten months after date.

"Plea: that the defendant did not have due notice of dishonor of the bill as alleged.

"At the trial before Erle, J., at the last Hertfordshire assizes, it appeared that the bill in question had been indorsed to 'Stuckey's Somersetshire Banking Company;' and that, on the day after the bill became due, the London manager of the company called at the office of the defendant, and inquired whether he was within. A clerk said he was engaged: whereupon, the manager wrote on a scrap of paper, and sent in to the defendant the following notice: 'Bosville's acceptance to Mr. Joel, £500, due 12th January, is unpaid. Payment to Robarts Co. is requested before 4 o'clock.' The clerk who took in the notice to the defendant returned, and said that 'it should be attended to.'

"It was objected, on behalf of the defendant, that the notice of dishonor was insufficient. The learned judge directed a verdict for the plaintiff, reserving leave to the defendant to move to enter a verdict for him." — ED.

[2] Before Wightman, Williams, Crompton, Crowder, Willes, Byles, and Hill, JJ.

[3] 1 E. & B. 801. [4] 10 A. & E. 125. [5] 14 M. & W. 44.

son. [CROMPTON, J. When it is said that a bill has not been paid, it means that it has not been paid in the regular course.] In Furze *v.* Sharwood,[1] several notices in similar terms to the present were held insufficient. [CROWDER, J. In Hedger *v.* Steavenson, Parke, B., said that it seemed to him enough, if it appeared by reasonable intendment, and would be inferred by any man of business, that the bill had been presented to the acceptor and not paid by him. In this case, does it not appear by reasonable intendment, and would it not be inferred by any man of business, that the bill had been presented and not paid?] He also referred to Byles on Bills, p. 236, note, 7th ed.

Archibald appeared for the plaintiff, but was not called upon to argue.

WIGHTMAN, J. We are all of opinion that the judgment of the Court of Exchequer ought to be affirmed. The case of Solarte *v.* Palmer is distinguishable, for there the notice did not state that the bill was unpaid, but merely demanded payment. That is the main ground of the decision; and that is relied on by the Lord Chancellor in his judgment. But in Hedger *v.* Steavenson it was laid down by Parke, B., that where the terms of the notice are such that it appears by reasonable intendment, and would be inferred by any man of business, that the bill has been presented to the acceptor and not paid by him, although it does not appear by express terms or necessary implication, that is sufficient. In Bailey *v.* Porter, the defendant was informed that the acceptance due that day was unpaid: here there is the same expression, and there is added, "Payment is requested before four o'clock." Bailey *v.* Porter has been referred to on many occasions, and has always been considered an authority on this question.

Judgment affirmed.[2]

[1] 2 Q. B. 888.

[2] Bailey *v.* Porter, 14 M. & W. 44; Maxwell *v.* Brain, 10 Jur. N. S. 777; Mills *v.* U. S. Bank, 11 Wheat. 481, *accord.*

Page *v.* Gilbert, 60 Me. 485; Armstrong *v.* Thruston, 11 Md. 148; Gilbert *v.* Dennis, 8 Met. 495; Pinkham *v.* Macy, 9 Met. 174; Dole *v.* Gold, 5 Barb. 490; Arnold *v.* Kinloch, 50 Barb. 44; Townsend *v.* Lorain Bank, 2 Oh. St. 345 (*semble*) Sinclair *v.* Lynah, 1 Speers, 244, *contra.*

Conf. Clark *v.* Eldridge, 13 Met. 96. — ED.

SECTION II. — *Continued.*

Notice of Dishonor — (continued).

(b) When the Notice should be given.

SMITH v. MULLETT.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., JULY 6, 1809.

[*Reported in* 2 *Campbell*, 208.]

ACTION against the indorser of a bill of exchange drawn by one Mills, payable to his own order, and indorsed by him to the defendant, by the defendant to one Hefford, by Hefford to one Aylett, by Aylett to the plaintiff, and by the plaintiff to one Lowe.

The bill became due on Saturday, May 19th, when it was in Lowe's hands. He and all the parties to it reside in the metropolis. On Monday the 20th, Lowe gave notice to the plaintiff that the bill had been dishonored. On Tuesday afternoon, a few minutes past five, the plaintiff's clerk put a letter into the two-penny post-office, giving notice to Aylett. This letter having been put in so late, according to the course of the two-penny post, was not delivered out till Wednesday morning. On Wednesday, Aylett gave notice to Hefford, and Hefford to the defendant. The question was, whether the defendant had received due notice of the dishonor of the bill.

Park and Coltman maintained that the notice was sufficient on the authority of Scott *v.* Lifford, where a bill of exchange, all the parties to which resided in London or the vicinity, becoming due on the 4th of the month, it was then presented for payment by the payee's bankers, who returned it to him dishonored on the 5th; and the court held that a letter from him, put into the two-penny post on the 6th (at what hour did not appear), was reasonable notice to the drawer of the dishonor of the bill. The rule therefore was that every indorsee should have a day to give notice to his indorser; and here, reckoning the number of indorsees, it would be found that the defendant had received notice a day sooner than he had a right to require it.

LORD ELLENBOROUGH. It is of great importance that there should be an established rule upon this subject; and I think there can be none more convenient than that, where the parties reside in London, each party should have a day to give notice. I have before said, the holder of a bill of exchange is not, *omissis omnibus aliis negotiis*, to

devote himself to giving notice of its dishonor. It is enough if this be done with reasonable expedition. If you limit a man to the fractional part of a day, it will come to a question how swiftly the notice can be conveyed: a man and horse must be employed, and you will have a race against time. But here a day has been lost. The plaintiff had notice himself on the Monday, and does not give notice to his indorser till the Wednesday. If a party has an entire day, he must send off his letter conveying the notice within post-time of that day. The plaintiff only wrote the letter to Aylett on the Tuesday. It might as well have continued in his writing-desk on the Tuesday night as lie at the post-office. He has clearly been guilty of laches, by which the defendant is discharged.

Plaintiff nonsuited.[1]

TURNER v. LEACH.

AT GUILDHALL, CORAM LORD ELLENBOROUGH, C. J., SITTINGS AFTER HILARY TERM, 1818.

[*Reported in Chitty, Bills* (10*th Edition*), 382, *note* 13.]

ASSUMPSIT by the eleventh indorser of a bill of exchange against the eighth indorser, for default of payment. It appeared that in due time, on the 4th of September, 1817, the returned bill, with notice of the dishonor, was left at the house of Richard Bennett, the tenth indorser, enclosed in a letter addressed to him; that in consequence of the dangerous illness of his wife at a distant place he had, on the 1st of September, left his house in care of a lad, who had no authority to open letters, intending to return on 3d of September; but that, owing to his wife having become dangerously worse, he did not return till after the 8th of September, on which day his brother opened the letter, and immediately gave notice of the dishonor of the bill to the plaintiff, who paid it and then called upon the defendant, who insisted that he was discharged for want of earlier notice. It was urged for the plaintiff that the dangerous illness of Richard Bennett's wife excused his absence from home and the delay in giving notice of the dishonor; and that, as the dishonor is contrary to the contract and the expectation of the parties, there is no reason for requiring an indorser

[1] Hilton v. Fairclough, 2 Camp. 633; Fowler v. Hendon, 4 Tyrwh. 1002; Dobree v. Eastwood, 3 C. & P. 250; Stocken v. Collin, 7 M. & W. 515; Poole v. Dicas, 1 Scott, 600, *accord*. — ED.

to be in the way, or to appoint an agent in his absence to provide for such an event. But Lord Ellenborough ruled that these circumstances constituted no excuse for the delay in giving notice.

WRIGHT v. SHAWCROSS.

In the King's Bench, Easter Term, 1819.

[*Reported in* 2 *Barnewall & Alderson*, 501, note (*a*)].

Jones, in the first four days of this term, moved for a rule *nisi* to set aside the verdict for the plaintiff in this case, which was tried before the chief justice of Chester at the last assizes there. He moved it on two grounds: first, that by laches the plaintiff had made the bill of exchange, which had been given in payment for the goods, for which the action was brought, his own. The bill had been drawn by P. B. on Messrs. L. R. & Co., and was dated 1st January, 1817. And it had been delivered without having been indorsed by defendant to plaintiff. It was presented for payment in London on the 3d April. On the 4th, a letter was written by the plaintiff, informing him of it, which he received on the 6th April, being Sunday. On the Tuesday evening, notice by the post was sent to the defendant. The court held that the plaintiff was not bound to open the letter from London till the Monday morning, and that, taking him to have received notice of the dishonor at that time, he had done quite sufficient in transmitting it to the defendant by the next day's post; and that, therefore, he had been guilty of no laches whatsoever.[1]

[1] Hilton *v.* Shepherd, 6 East, 14, n.; Langdale *v.* Trimmer, 15 East, 291; Miers *v.* Brown, 11 M. & W. 372; Mackenzie *v.* Dott (Court of Session), July 18, 1861; Lenox *v.* Roberts, 2 Wheat. 373; Fullerton *v.* Bank of U. S., 1 Pet. 604; Bank of Alexandria *v.* Swann, 9 Pet. 33; Seventh Ward Bank *v.* Hanrick, 2 Story, 416; Whitman *v.* Farmers' Bank, 8 Port. 258; Flack *v.* Green, 3 Gill & J. 474; Whitwell *v.* Johnson, 17 Mass. 449; Eagle Bank *v.* Chapin, 3 Pick. 180; Talbot *v.* Clark, 8 Pick. 51; Church *v.* Barlow, 9 Pick. 547; Eagle Bank *v.* Hathaway, 5 Met. 212; Haskell *v.* Boardman, 8 All. 38; Fortner *v.* Parham, 10 Miss. 151; American Co. *v.* Emerson, 12 Miss. 177; Carter *v.* Burley, 9 N. H. 558; Manchester Bank *v.* Fellows, 28 N. H. 302; Mead *v.* Engs, 5 Cow. 303; Lawson *v.* Farmers' Bank, 1 Oh. St. 206; Stephenson *v.* Dickson, 24 Pa. 148; Mitchell *v.* Cross, 2 R. I. 437, *accord*.

Tindal *v.* Brown, 1 T. R. 167; Darbishire *v.* Parker, 6 East, 3, in which a stricter measure of diligence was required than that adopted in the principal case, are no longer law. — Ed.

TURNER v. LEECH.

IN THE KING'S BENCH, MAY 18, 1821.

[*Reported in 4 Barnewall & Alderson, 451.*]

ASSUMPSIT by plaintiff, as indorsee, against the defendant, as a prior indorser of a bill of exchange for £50, payable three months after date. Plea, general issue. The cause was tried at the Guildhall sittings after Hilary term, 1818, before Lord Ellenborough, C. J., when the jury found a verdict for the plaintiff, subject to the opinion of this court, upon the following case. The defendant was the eighth, and the plaintiff the eleventh, indorser of the bill of exchange, which was indorsed by him to Bennett, and by him to Fletcher, and by him to Hordern & Co., bankers at Wolverhampton, who transmitted the same to their London correspondents, Messrs. Sanson & Co., who were the holders when the bill became due. The bill was duly presented for payment on Saturday the 30th August, 1817, and dishonored. On Monday the 1st September, 1817, Sanson & Co. wrote to Hordern & Co. at Wolverhampton, duly informing them of such dishonor, which letter was received by them on Tuesday the 2d September. Notice of the dishonor was on the 2d September given to Fletcher; and on Wednesday, the 3d September, a letter giving information of such dishonor was sent by the post by Fletcher to Bennett at Stockport, where he resided, and which letter was delivered there at his shop on Thursday the 4th September. This letter was not opened, and no notice was given to the plaintiff or any other party before Monday the 8th September. On the 8th September, the plaintiff first received notice of the dishonor, and immediately paid the amount of the bill to Bennett. John Davies, the tenth indorser, Washington and Horner, the ninth indorsers, and the defendant, the eighth indorser, all resided at Stockport. It was admitted, in addition, that the defendant had notice of the dishonor either on the 8th or 9th September, 1817.

Chitty, for the plaintiff. In this case, the defendant received notice of dishonor on the 9th September at the latest; and, if notice had been given to each successive indorser in the regular course, he would not have received it at an earlier period. Then he has received no injury by the neglect. Suppose the holder gives notice on the same day to six successive indorsers, and the seventh indorser receives notice of it six days afterwards, surely he ought not to be allowed to defend himself on the ground of laches, when in the regular course he could not have received notice sooner.

J. Williams, contra, stopped by the court.

ABBOTT, C. J. In this case, the plaintiff, who ought to have received notice of the dishonor of the bill of exchange from Bennett on the 5th September, did not, in fact, receive notice till the 8th; and, therefore, he was clearly discharged by the laches of the holder. Then can he, by paying the bill, place the prior indorsers in a worse situation than that in which they would otherwise have been? I think he cannot do so; and that in paying this bill he has paid it in his own wrong, and cannot be allowed to recover upon it against the defendant. *Judgment for the defendant.*[1]

GEILL v. JEREMY AND ANOTHER.

AT NISI PRIUS, CORAM LORD TENTERDEN, C. J., MAY 16, 1827.

[*Reported in Moody & Malkin*, 61.]

ASSUMPSIT by the indorsee of a bill of exchange against the drawer.

The only question was as to the regularity of the notice of dishonor. The plaintiff, who lived near Chorley in Lancashire, received notice of the dishonor by the post at nine o'clock in the morning of Thursday, August 31. The post left the village where he resided at six that evening, and the mail-bags were not made up at Chorley (two miles off) till nine in the evening. The plaintiff did not write by that post, which would have arrived in London, to which this letter was to be addressed, on Saturday; and, there being no post to London on the Friday, he did not write till the Saturday.

Storks, for the defendants, contended that this notice was insufficient. In Darbishire v. Parker,[2] it was doubted whether the notice should not always be sent by the very next post, if that were possible; and, though subsequent cases have laid down the rule that the post of the next day is in all cases sufficient, there is no instance in which it has been decided that the party is entitled to make a delay of two days, when he might, by ordinary diligence, avoid it. In this case, he might, with perfect ease, have written on the Thursday, and was therefore not entitled to wait till the Saturday.

LORD TENTERDEN, C. J. In these cases, it is of great importance to have a fixed rule, and not to resort to nice questions of the sufficiency, in each particular case, of a certain number of hours or min-

[1] Triplett v. Hunt, 3 Dana, 126; Etting v. Schuylkill, 2 Barr, 355 (*semble*); Brown v. Ferguson, 4 Leigh, 37, *accord*. — ED.

[2] 6 East, 3.

utes. The general rule is that the party need not write on the very day that he receives the notice. If there be no post on the following day, it makes no difference: the next post after the day on which he receives the notice is soon enough.

Verdict for the plaintiff.[1]

ROWE v. TIPPER.

In the Common Pleas, January 27, 1853.

[*Reported in* 18 *Common Bench Reports*, 249.]

Assumpsit by indorsee against indorser of a bill of exchange.

The declaration stated that one Green, theretofore, to wit, on the 12th of July, 1851, made his bill of exchange in writing, and directed the same to Messrs. Knight & Co., and thereby required them to pay to his order the sum of £52 9*s*., four months after the date thereof, for value received, which period had elapsed before the commencement of the suit; that Green indorsed the bill to the defendant; that the defendant indorsed it to one Abley; and that Abley indorsed it to the plaintiff before it became due; and that Knight & Co. did not pay the said bill, although the same was duly presented to them for payment on the day when it became due, — of all which the defendant then had due notice, and then, in consideration of the premises, promised the plaintiff to pay him the amount of the said bill, on request.

By his sixth plea, the defendant traversed the notice of dishonor.

The cause was tried before Cresswell, J., at the second sitting in London, in Michaelmas term last. It appeared that the bill was duly presented when it became due, — viz., on Saturday the 15th of November, 1851, at the place where it was made payable, — and was dishonored; that the plaintiff, on the 17th of November, gave notice of dishonor to Abley, and on the 18th (through the agency of one Delane) gave notice to the defendant.

On the part of the defendant, it was insisted that the notice to him

[1] Townsley *v.* Springer, 1 La. 122 (*semble*), *accord*.

So, if the only post of the following day closes before the beginning of business hours, the next post thereafter is soon enough. Hawkes *v.* Salter, 4 Bing. 715; Davis *v.* Hanley, 12 Ark. 645; Chick *v.* Pillsbury, 24 Me. 458 (overruling Goodman *v.* Norton, 17 Me. 381 and Beckwith *v.* Smith, 22 Me. 125); Farmers' Bank *v.* Duvall, 7 Gill & J. 78; Downs *v.* Planters' Bank, 9 Miss. 261; Deminds *v.* Kirkman, 9 Miss. 644; Wemple *v.* Dangerfield, 10 Miss. 445; Carter *v.* Burley, 9 N. H. 558 (*semble*); Burgess *v.* Vreeland, 4 Zab. 71; Lawson *v.* Farmers' Bank, 1 Oh. St. 206 (*semble*) West *v.* Brown, 6 Oh. St. 542; Stephenson *v.* Dickson, 24 Pa. 148; Butler *v.* Duval, 4 Yerg. 265; Mitchell *v.* Cross, 2 R. I. 437 (*semble*). — Ed.

was too late, and that there was no evidence that the notice given by Delane was given with the authority of the plaintiff, all that was proved being that the bill had been placed in Delane's hands to obtain payment.

For the plaintiff, it was insisted that, inasmuch as the notice reached the defendant in the same time as it would have done if Abley had given it, it was a sufficient notice, and that Delane was duly authorized to give the notice; and the case of Turner *v.* Leech was referred to.

The learned judge directed the jury to find for the defendant on the sixth issue, reserving leave to the plaintiff to enter the verdict for him, for the amount of principal and interest, if the court should be of opinion that the notice was sufficient.

Hawkins, in Michaelmas term last, obtained a rule *nisi* accordingly.

Macnamara (with whom was *Shee*, Serjt.) now showed cause against the plaintiff's rule.

Hawkins, in support of his rule.[1]

JERVIS, C. J. It seems to me that the rule laid down in Chitty and Hulme is the correct rule, and that, if the holder of a bill of exchange wishes to avail himself of a notice of dishonor, given by him to a remote indorser, he must give it within the time within which he is by law required to give it to his immediate indorser; and he cannot avail himself of his laches, to gain another day. If he could, the consequence which has been pointed out would follow; viz., that, if there were twenty indorsers, he would have twenty days within which to give notice to the first of them. The rule is correctly laid down by Burrough, J., in Dobree *v.* Eastwood,[2] that the holder has his day to give notice to any party he may seek to charge, and that each of the prior indorsers in turn has his day. Each has one day to give notice to all the parties against whom he intends to enforce his remedy. That is the result of all the decisions. No doubt it is settled that the holder need not himself have given all the notices: he may avail himself of a notice duly given by any other party to the bill. That was decided in Chapman *v.* Keane. And in Harrison *v.* Ruscoe, Parke, B., commenting upon that case, says: "The notice, by the terms of the rule, as laid down by the Court of Queen's Bench, must be given in due time by the party to the bill; that is, in due time, if he himself were suing." That, in fact, is recognizing the rule as stated in Chitty and Hulme. The notice upon which the plaintiff relies in this case is his own notice; and he must show that that was given in due time. He gave notice in due time to Abley, his immediate indorser; but he

[1] The arguments of counsel have been omitted. — ED.

[2] 3 C. & P. 250.

did not give due notice to the defendant. I am, therefore, of opinion that he has by his laches released the defendant; and consequently the rule which has been obtained to enter the verdict for the plaintiff on the sixth issue must be discharged. The cross-rule, which now becomes unnecessary, will also be discharged.

MAULE, J. I am of the same opinion. The cases cited are not distinguishable in principle from the case in hand. The rule is that the party who is sought to be charged upon the bill is entitled to prompt notice of its dishonor by the acceptor. Where the parties live in the same town, it has been said that the notice must be given in time to be received in the course of the day next after the dishonor of the bill, or after the party giving the notice had himself received notice of dishonor. There must be due diligence, — not that the party is bound to neglect all other business, and the moment he receives notice send a notice to those he means to charge. He has a whole day, and so much more as will enable him, using due diligence, to communicate the notice to the party sought to be charged. A day is not in all cases the limit. If there are many indorsers, and the notice in fact travels through them all, if there has been no want of diligence between any two of them, whatever time is occupied, the notice will be good. Although it looks extremely plausible, the rule is not that each indorser has a day; but the rule is that due diligence shall be observed in the actual state of circumstances in which the notice is given. Here, the plaintiff, if he meant to charge the defendant, should have given him notice on the day after the dishonor of the bill, there being nothing to prevent his doing so. He has, therefore, by his laches discharged the defendant. I therefore concur with the Lord Chief Justice in thinking that this rule should be discharged.

The rest of the court concurring, *Rule discharged.*[1]

GLADWELL v. TURNER.

IN THE EXCHEQUER, JANUARY 14, 1870.

[*Reported in Law Reports, 5 Exchequer, 59.*]

DECLARATION by an indorsee of a bill of exchange for £28 against the drawer.

Plea, traversing the giving of due notice of dishonor. Issue thereon.

[1] Marsh v. Maxwell, 2 Campb. 210, n.; Simpson v. Turney, 5 Humph. 419, *accord.* — ED.

At the trial before Kelly, C. B., at the sittings for Middlesex after last Michaelmas term, it appeared that the bill declared on was drawn by the defendant on one Welsh at three months after date, and duly accepted, and was afterwards indorsed to one Smith, who indorsed it to the plaintiff. It became due on Friday the 17th of September, 1869, and was presented on that day to Welsh by the plaintiff, but was dishonored. All the parties to the bill lived in London. On the day following its dishonor, the plaintiff, with a view of giving notice to the defendant, and being ignorant of his address, applied to Smith for information. Smith was from home; but later on the same day, at about half-past five in the afternoon, the plaintiff went to him again, and obtained the defendant's address. He posted his notice of dishonor the same evening, but not until after six o'clock. The consequence was that it was not received by the defendant until Monday the 20th of September. If it had been posted before six, the defendant would, in the ordinary course of the London postal delivery, have received it on the Saturday evening. The jury, under the direction of the learned judge, found that the plaintiff had exercised reasonable diligence in forwarding the notice of dishonor, and thereupon a verdict was entered for the plaintiff, with leave to move to enter a verdict for the defendant.

H. T. Cole, Q. C., moved accordingly, on the ground that the notice of dishonor was too late. The plaintiff, if he had pleased, might have discovered the defendant's address from Welsh, the acceptor, on the day the bill was dishonored.

[MARTIN, B. I do not think he was bound to make instant inquiry. It is enough if, on the day following, he used reasonable diligence in discovering where the defendant lived.]

At all events, he might have posted his notice before six on the Saturday evening, in which case it would have been delivered the same night. Not having done so, he cannot be said to have exercised reasonable diligence, and therefore comes within the rule that, where all the parties to a bill live in London, notice of dishonor must be given so as to be received on the day after the actual dishonor of the bill. Bateman *v.* Joseph,[1] Williams *v.* Smith; Byles on Bills, 9th ed. p. 275.

KELLY, C. B. I think this rule ought to be refused. The holder of a bill is not bound, *omissis omnibus aliis negotiis*, to devote himself to giving notice of its dishonor. He must, however, use due and reasonable diligence, or the notice will be too late. Now here, unless we are prepared to say as a matter of law that the plaintiff was under any absolute necessity of writing and posting his notice in the half-hour

[1] 2 Camp. 461.

which elapsed from his discovery of the defendant's address and six o'clock, I am of opinion that there was evidence of sufficiently reasonable diligence, both in discovering the address and in posting the notice. The notice was therefore in time; and the verdict ought not to be disturbed.

MARTIN, B. I am of the same opinion. My impression is that the cases show that, in calculating the time within which notice of dishonor must be given by the holder of a bill, the point for commencement is not the day after the bill becomes due, but the day after that on which the holder, after exercising reasonable diligence, is in a position to give the notice.[1]

CHANNELL and PIGOTT, BB., concurred.

Rule refused.[2]

[1] Burk v. Shreve, 39 N. J. 214, 219 (*semble*), *accord*.

See Chapcott v. Curlewis, 2 M. & Rob. 484, *contra*. — ED.

[2] In Bateman v. Joseph, 12 East, 433; Browning v. Kinnear, Gow, 81; Baldwin v. Richardson, 1 B. & C. 245; Firth v. Thrush, 8 B. & C. 387; Hewitt v. Themson, 1 M. & Rob. 543; Sturges v. Derrick, Wight. 76; Dixon v. Johnson, 1 Jur. N. S. 70; Hartford Bank v. Stedman, 8 Conn. 489, the holders were held to have used due diligence.

In Howland v. Adrain, 30 N. J. 41, due diligence was not used.

A person who takes up a bill for the honor of a party being in effect an indorsee of that party, is entitled, like any holder, to his day for giving notice. Goodall v. Polhill, 1 C. B. 233.

HOUR OF SERVING NOTICE. — If the service is made on the last of the days during which a valid notice may be given and not by mail, but by delivery at the place of business or dwelling-house of the party to be charged, the notice must be delivered at a reasonable hour, that is to say, during business hours, if at the place of business. Bancroft v. Hall, Holt, N. P. 476; Stanley v. Bank of Mobile, 23 Ala. 652; John v. City Bank, 57 Ala. 96; Adams v. Wright, 14 Wis. 408, 416; or before the hours of rest, if at the dwelling-house. Adams v. Wright, 14 Wis. 408, 416. But a notice delivered at an unreasonable hour will be sufficient, if actually received by the party to be charged on the proper day. Jameson v. Swinton, *infra*, 417; Bonnet v. New Orleans, 2 Woods, 185; Hallowell v. Curry, 41 Pa. 322 (*semble*). — ED.

HOWARD, PRESIDENT, &c. v. IVES.

IN THE SUPREME COURT, NEW YORK, MAY, 1841.

[*Reported in* 2 *Hill*, 263.]

ASSUMPSIT, tried at the Saratoga circuit, in May, 1840, before Willard, C. J. The action sought to charge the defendant as indorser to the plaintiff of a bill of exchange, drawn on and accepted by one Webster, of the city of New York. The plaintiff had indorsed it to the Union Bank of that city for collection; and the latter gave it to their notary, who presented and protested it for non-payment on Saturday, August 31st, 1839, between the hours of three and five P. M. On Monday following, the notary mailed notice of protest to the plaintiff, enclosing another for the defendant, in season for the New York five o'clock mail to Troy, at which latter place the plaintiff resided. The plaintiff received these on Tuesday following, at eight o'clock A. M.; and the same day, after nine o'clock A. M., the notice of protest intended for the defendant was mailed at Troy, directed to him at Lansingburgh, his place of residence; but the mail for the day had closed before this was done. It appeared in evidence that the course of mails from New York to Troy was as follows: One mail was closed on Saturday at three o'clock P. M., and started at five P. M.; two left on Sunday; and on Monday one closed at half-past five A. M., leaving at seven A. M., but there was no other on that day except the one by which the notice in question was sent.

The defendant objected to the plaintiff's right of recovering, on the following grounds: 1. That notice of protest should have been mailed at New York in time for one of the mails which left on Sunday; or, at all events, in time for the Monday morning's mail; 2. That the notice mailed at Troy by the plaintiff to the defendant should have been deposited in the post-office before the mail for Lansingburgh had closed; 3. That notice should have been mailed at New York, directed to the defendant at Lansingburgh.

The circuit judge overruled the objections: whereupon, exceptions were taken, and the defendant now moved for a new trial on a bill of exceptions.

C. L. Tracy, for defendant.

S. G. Huntington, for plaintiff.

BY THE COURT, COWEN, J. For the purpose of transmitting notice of protest, the Union Bank, though in fact a mere agent to collect, must be regarded as a principal.[1] The legal interest in the bill pass-

[1] Haynes v. Birks, 3 B. & P. 599; Robson v. Bennett, 2 Taunt. 388; Langdale v. Trimmer, 15 East, 291; Bray v. Hadwen, 5 M. & Sel. 68; Seaton v. Scovill, 18

ing by indorsement to that bank, it must be considered the holder at the time when the bill was presented for payment; and the notary must be considered, therefore, as servant to that bank. Mead v. Engs,[1] Scott v. Lifford. According to the last case cited, probably the same time would be allowable whether the Union Bank be regarded as a mere agent or as principal. And *vide* Haynes v. Birks.[2]

But, whether this is so or not, it was regular to mail the notice to the plaintiff on the next day after presentment and protest. The holder is never required to mail notice to his indorser the very day on which default is made in payment. Chitty on Bills, 513 (Am. ed. of 1839), and the cases there cited.

The next day means the next business day. Here, the protest being on Saturday, the notice was properly mailed on the next Monday, leaving the intermediate Sunday out of the computation.[3] Id. 519; Haynes v. Birks,[2] Wright v. Shawcross.

Mailing in season for either of the two mails on Monday was sufficient. It is urged that the morning post was neglected; but the mail for that post closed before the common hours of business. The question is whether the holder used ordinary diligence. It is not necessary to say that, in all cases where there are several mails on the same day, the party may elect by which he will send.[4] Clearly, he comes to

Kas. 433; Smith v. Roach, 7 B. Mon. 17; Carmena v. Bank of La., 1 La. An. 369; Freeman's Bank v. Perkins, 18 Me. 292; Crocker v. Getchell, 23 Me. 392; Colt v. Noble, 5 Mass. 167; Church v. Barlow, 9 Pick. 547; Eagle Bank v. Hathaway, 5 Met. 212; Renshaw v. Triplett, 23 Mo. 213; Manchester Bank v. Fellows, 28 N. H. 302; Mead v. Engs, 5 Cow. 303; Bank of U. S. v. Davis, 2 Hill, 451; Ogden v. Dobbin, 2 Hall, 112; Mitchell v. Cross, 2 R. I. 437; Butler v. Duval, 4 Yerg. 265; Friend v. Wilkinson, 9 Grat. 31, *accord*.

The different branches of a bank through which a bill or note may pass are to be regarded as distinct holders in estimating the time at which notice of dishonor should be given. Clode v. Bayley, 12 M. & W. 51; Woodland v. Fear, 7 E. &. B. 519, 522; Prince v. Oriental Corporation, 3 App. Cas. 325, 332; U. S. Bank v. Goddard, 5 Mas. 366; McNeil v. Wyatt, 8 Humph. 125. — ED.

[1] 5 Cow. 303, 308.

[2] 3 Bos. & Pul. 599, 601.

[3] Haynes v. Birks, 3 B. & P. 599; Bray v. Hadwen, 5 M. & Sel. 68; Eagle Bank v. Chapin, 3 Pick. 180; Burgess v. Vreeland, 4 Zab. 71; Friend v. Wilkinson, 9 Grat. 31, *accord*.

Other holidays are similarly excluded in determining the proper day for serving notice. Martin v. Ingersoll, 8 Pick. 1 (Christmas); Cuyler v. Stevens, 4 Wend 566 (July 4th); Lindo v. Unsworth, 2 Camp. 602 (a Jewish festival).

A notice sent upon a holiday is nevertheless valid. Deblieux v. Bullard, 1 Rob. (La.) 66 (Sunday). But see Rheem v. Carlisle Bank, 76 Pa. 132 (Sunday), *contra*. — ED.

[4] There would seem to be no reason to doubt that the holder may send notice of dishonor by any mail of the right day. See Whitwell v. Johnson, 17 Mass. 449; Lawson v. Farmers' Bank, 1 Oh. St. 206, 215. — ED.

the mark, when he selects that post which leaves next after the hours of business commence for the day. This is the next practicable or convenient post. Mead v. Engs.[1]

The mailing by the plaintiff at Troy was clearly in season. It was done the very day on which the plaintiff received notice, no matter whether before or after the post had departed for Lansingburgh. In this method of charging indorsers and drawers, by consecutive notices from one party to the next immediately preceding him, the former is never bound to forward notice on the very day upon which he receives it, but may always wait till the next. Chitty on Bills, 515, 516 (Am. ed. of 1839); Chitty, Jr., 62 *a*, 63 (Am. ed. of 1834); Bayley on Bills, 264 (Am. ed. of 1836); Bray v. Hadwen,[2] Williams v. Smith, Geill v. Jeremy. The motion for a new trial is therefore denied.

Rule accordingly.

THE PRESIDENT, DIRECTORS, AND COMPANY OF THE FITCHBURG BANK v. ASA PERLEY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1861.

[*Reported in* 2 *Allen*, 433.]

CONTRACT, brought by third indorsers of a promissory note against the second indorser. The answer denied that legal notice of non-payment was given to the defendant.

At the trial in the superior court, the following facts were agreed: "At its maturity, the note being then in the possession of the Merchants' Bank at Boston, payment was duly demanded of the maker, and for non-payment the note was duly protested on the 5th of October, 1860. Upon the 6th of the same month, the Fitchburg Bank at Fitchburg, the present plaintiffs, being the last indorsers, received notice of non-payment and protest, and under the same cover a notice to the defendant, a copy of which is hereto annexed.[3] The

[1] 5 Cow. 307, *per* Sutherland, J.

[2] 5 Maule & Selw. 68, 70, and cases there cited.

[3] "Commonwealth of Massachusetts. Suffolk, ss. Boston, Oct. 5, 1860. Sir: A promissory note for one hundred and sixty-one dollars and forty eight cents, dated Boston, April 2, 1860, signed James W. Gates & Co., payable to the order of Greenwood & Nichols, at six months after date, indorsed Greenwood & Nichols, Asa Perley, 2d, C. I. Billings, cashier, payment of said note having been first duly demanded and refused, I have this day protested the same for non-payment; and I hereby notify you that the holder looks to you for non-payment, interest and cost. Done at the request of the cashier of the Merchants' Bank. Edward A. Dexter, Notary Public To Mr Asa Perley, 2d."

6th was Saturday, and this notice was put into the post-office at Fitchburg by the plaintiffs the same day, directed to the defendant at Gardner, which was his place of residence, but it was too late to go by the mail of that day. This notice was forwarded to the defendant upon the 8th, and was received by him upon the 9th. The mail from Boston to Gardner is direct, and a letter passes from Boston to Gardner the same day." Upon these facts, Russell, J., ordered judgment to be entered for the plaintiffs, and the defendant appealed.

C. H. B. Snow, for the defendant.

N. Wood, for the plaintiffs.

BIGELOW, C. J. The notice to the defendant of the non-payment of the note was clearly sufficient. There is nothing in the facts agreed which shows that the Merchants' Bank were not the legal holders of the note at the time of its maturity. The question of the sufficiency of the notice is therefore to be determined as between parties who stood in the relation of successive indorsees.[1] It was competent for the Merchants' Bank, as holders, to send notice to their immediate indorsers, the present plaintiffs; and if they, on receiving notice, seasonably transmitted it to the defendant, he is liable, although it did not reach him so soon as if it had been sent to him by the Merchants' Bank or their notary. In this case, there can be no doubt that the notice was seasonably sent by the plaintiffs. It was deposited by them in the post-office on the same day that it was received by them from the notary. Eagle Bank *v.* Hathaway.[2]

To the form of the notice, no valid objection can be made. It gave the defendant notice of all the facts necessary to charge him as indorser. Palen *v.* Shurtleff.[3] *Judgment for the plaintiffs.*[4]

[1] An additional day is not allowed for the transmission of notice by an agent of the holder to his principal, unless the agent is a party to the bill. *In re* Leeds Banking Co., L. R. 1 Eq. 1; Fish *v.* Jackman, 19 Me. 467 (*semble*). But see Poole *v.* Dicas, 1 Scott, 600; Firth *v.* Thrush, 8 B. & C. 387; Wynen *v.* Schappert, 6 Daly, 558.

If the holder, instead of sending notice to a prior party himself, sends notice to his own agent, not a party, from whom he received the bill, he must make sure that the prior party is notified as soon as he would have been if a direct notice had been sent to him. U. S. *v.* Barker, 12 Wheat. 559; Bartlett *v.* Hawley, 120 Mas. 92; Sewall *v.* Russell, 3 Wend. 276; Allemania Co. *v.* McLeod, 4 Mo. App. 489. — ED.

[2] 5 Met. 212.

[3] 9 Met. 581.

[4] U. S. Bank *v.* Goddard, 5 Mas. 366; Seaton *v.* Scovill, 18 Kas. 433; Smith *v.* Roach, 7 B. Mon. 17; Crocker *v.* Getchell, 23 Me. 392; Colt *v.* Noble, 5 Mas. 167; Church *v.* Barlow, 9 Pick. 547; Renshaw *v.* Triplett, 23 Mo. 23; Manchester Bank *v.* Fellows, 23 N. H. 302; Mead *v.* Engs, 5 Cow. 303; Bank of U. S. *v.* Davis, 2 Hill, 451; Ogden *v.* Dobbin, 2 Hall, 112; Wynen *v.* Schappert, 6 Daly, 558; Lawson *v.* Farmers' Bank, 1 Oh. St. 206; Stephenson *v.* Dickson, 24 Pa. 148; Mitchell *v.* Cross, 2 R. I. 347; Butler *v.* Duval, 4 Yerg. 265; McNeil *v.* Wyatt, 3 Humph. 125, *accord.* — ED.

A. B. JAMES & Co. v. ABSALOM WADE.

IN THE SUPREME COURT, LOUISIANA, AUGUST, 1869.

[*Reported in* 21 *Annual Reports*, 548.]

APPEAL from the District Court, parish of Winn. Orsborn, J.

J. C. Weeks and *J. M. B. Tucker*, for plaintiffs and appellants.

Jack & Pierson, for defendant and appellee.

HOWE, J. The defendant is sued as the indorser of a bill of exchange drawn by W. R. Hughes on Moore & Browder, of New Orleans, and by the latter accepted, payable on the 15th February, 1863.

On the day of its maturity the bill was protested by a notary in New Orleans, and a notice deposited in the post-office in that city addressed to the defendant at Winnfield, parish of Winn, Louisiana.

The record shows that in February, 1863, all postal and commercial intercourse was suspended between New Orleans and Winnfield. The war was then raging, and the deposit of the notice in the post-office in New Orleans had no effect in converting the conditional obligation of the indorser into an absolute liability. 19 An. 43, 63, 64, 72, 90; 20 An. 399.

If the holders of this bill desired to bind the indorser, it was their duty to have given him notice of dishonor within a reasonable time after the close of the war, and the resumption of commercial intercourse.[1] There being no evidence that any notice except the one described above was ever given, the indorser must be held to have been discharged.[2]

[1] This rule was recognized in Morgan *v.* Louisville Bank, 4 Bush, 82; Shaw *v.* Neal, 19 La. An. 156; Harp *v.* Kenner, 19 La. An. 68; Greves *v.* Tomlinson, 19 La. An. 90; Dunbar *v.* Tyler, 44 Miss. 1; Harden *v.* Boyce, 59 Barb. 425; Billgerry *v.* Branch, 19 Grat. 393; Farmers' Bank *v.* Gunnell, 26 Grat. 131; Tardy *v.* Boyd, 26 Grat. 631; McVeigh *v.* Old Dominion Bank, 26 Grat. 785, in which cases due diligence was not used; and in Peters *v.* Hobbs, 25 Ark. 67; House *v.* Adams, 48 Pa. 261, in which cases due diligence was used.

See Hopkirk *v.* Page, 2 Brock. 20; Union Bank *v.* Marr, 6 Bush, 614; Apperson *v.* Union Bank, 4 Cold. 445.

Similarly, a delay in sending notice of dishonor caused by the prevalence of a malignant disease is excusable. Tunno *v.* Lague, 2 Johns. Cas. 1. See Roosevelt *v.* Woodhull, Anth. N. P. 50. — ED.

[2] A portion of the case relating to a question of waiver of notice has been omitted. — ED

SECTION II. — *Continued.*

Notice of Dishonor — (continued).

(c) WHERE THE NOTICE SHOULD BE GIVEN.

WALTER v. HAYNES.

AT NISI PRIUS, CORAM ABBOTT, C. J., SEPTEMBER 6, 1824.

[*Reported in Ryan & Moody*, 149.]

THIS was an action of assumpsit upon a bill of exchange by an indorsee against an indorser.

In order to prove the notice of dishonor, it was shown on the part of the plaintiff that a letter containing such a notice, and addressed to "Mr. Haynes, Bristol," was put into the post-office.

ABBOTT, Ld. C. J. This is not sufficient proof of notice. Where a letter, fully and particularly directed to a person at his usual place of residence, is proved to have been put into the post-office, this is equivalent to proof of a delivery into the hands of that person, because it is a safe and reasonable presumption that it reaches its destination; but where a letter is addressed generally to A. B. at a large town, as in the present case, it is not to be absolutely presumed from the fact of its having been put into the post-office that it was ever received by the party for whom it was intended. The name may be unknown at the post-office, or, if the name be known, there may be several persons to whom so general an address would apply. It is, therefore, always necessary, in the latter case, to give some further evidence to show that the letter did in fact come to the hands of the person for whom it was intended.

Other evidence was then given, tending to show that the letter had been received by the person to whom it was addressed, and the plaintiff had a verdict.[1]

[1] Beckwith v. Smith, 22 Me. 125; Bartlett v. Robinson, 39 N. Y. 187, *accord*. See True v. Collins, 3 All. 438. — ED.

MANN v. MOORS.

AT NISI PRIUS, CORAM LORD TENTERDEN, C. J., MAY 25, 1825.

[*Reported in Ryan & Moody*, 249.]

ACTION on a bill of exchange by the indorsee against the drawer.

The bill as drawn was dated Manchester, and, upon being presented for payment at the acceptor's in London, was dishonored. The only evidence given of notice to the defendant of the bill having been dishonored was that a letter containing such a notice had been put into the post-office in London, directed to "Mr. Moors, Manchester."

Wightman, for the defendant, contended that this was not a sufficient notice of the dishonor of the bill; that it was the duty of the plaintiff to have inquired of the prior holders of the bill the particular address of the defendant in the town of Manchester; that it was most likely a letter so directed, to so large a town as Manchester, would not reach the defendant.

ABBOTT, Ld. C. J. I am of opinion that this was sufficient notice of the dishonor of the bill. If the drawer of a bill of exchange dates his bill London, I think a notice of dishonor by letter, addressed to him London, will be sufficient. *Verdict for the plaintiff.*[1]

BERRIDGE v. FITZGERALD.

IN THE QUEEN'S BENCH, JUNE 9, 1869.

[*Reported in Law Reports*, 4 *Queen's Bench*, 639.]

DECLARATION against the defendant as indorser of a bill of exchange.

Plea: a traverse of the notice of dishonor.

Issue thereon.

[1] Grugeon v. Smith, 6 A. & E. 499; Clarke v. Sharpe, 3 M. & W. 166; Siggers v. Brown, 1 M. & Rob. 520; Burmester v. Barron, 17 Q. B. 828; Renwick v. Tighe, 8 W. R. 391, *accord*.

But see Foard v. Johnson, 2 Ala. 565; Tyson v. Oliver, 43 Ala. 455; Sprague v. Tyson, 44 Ala. 388; Barnwell v. Mitchell, 3 Conn. 101; Hill v. Varrell, 3 Greenl. 233; Chapman v. Lipscombe, 1 Johns. 294 (*semble*); Lowery v. Scott, 24 Wend. 358; Runyon v. Montfort, Busbee, 371; Fitler v. Morris, 6 Whart. 406; Earnest v. Taylor, 25 Tex. Supp. 37, in which cases it was held that a holder must at his peril use due diligence in ascertaining whether the place indicated in the bill was in reality the city or town of the drawer's residence or business.

Conf. Page v. Prentice, 5 B. Mon. 7; Fisher v. Evans, 5 Binn. 541; Pierce v Struthers, 27 Pa. 249. — ED.

At the trial before Blackburn, J., at the sittings in London after Michaelmas term, 1868, it appeared that the plaintiff had supplied stationery for the purposes of the business to the Industrial London Loan and Interest Company, Limited, and threatened to sue the company for the amount, £72 10*s.*; but he agreed to take a bill of exchange for the amount accepted by the company, provided two directors of the company indorsed the bill. Accordingly, the plaintiff attended at the office of the company, 20 Great George Street; and a bill of exchange, dated the 22d of April, 1868, was drawn by the plaintiff to his own order, for £72 10*s.*, payable at three months, upon the "Industrial London Loan and Interest Company, Limited, 20 Great George Street, W. C.," and the bill was then and there accepted on behalf of the company, by C. Beavan, manager, and indorsed by the defendant and J. Johnstone, both of whom were acting directors, and in the habit of attending at the company's office.

Soon after this, there was a proposal for amalgamation with the Provident Union Company, Bridge Street, Blackfriars, but the amalgamation was not carried out; and in June a petition was filed, and on the 17th of July an order made for winding up the company.

The bill being unpaid at maturity, the plaintiff immediately sent notice of dishonor to the defendant, addressed to the office of the company, 20 Great George Street; but it did not reach him till some time afterwards, as he had ceased to attend at the office of the company upon the company becoming embarrassed.

The defendant lived at Petersham, but the plaintiff knew nothing about him. The plaintiff made inquiries at the office of the Provident Union Company, and also of one of the directors of the other company, who informed him that the defendant lived somewhere on the South Western line of railway; but the plaintiff did not inquire at the office of the defendant's company, 20 Great George Street.

The writ was issued on the 29th of July, and served on the defendant on the 4th of August, 1868, at his house at Petersham.

In answer to a question of the learned judge, the jury found that the plaintiff had done his best to find out the private residence of the defendant; and a verdict was directed for the plaintiff, with leave to the defendant to move to enter a nonsuit.

A rule was obtained accordingly, on the ground that there had been no notice of dishonor, and no circumstances to excuse the want of it.

Warton showed cause, and contended that the plaintiff did make sufficient inquiry as to the place of residence of the defendant; and, if not, the notice of dishonor at the place of business of the company, for whose debt the bill was accepted, and on his behalf the defendant, as director, became surety, was sufficient. The defendant gave no

other address, and for the purposes of the bill he must be considered to have held out that place as his place of business. He cited Siggers v. Browne,[1] Hewitt v. Thompson,[2] Beveridge v. Burgis,[3] Rowe v. Tipper.

[HAYES, J., referred to Bateman v. Joseph.[4]]

Hodgson, for the defendant, was directed by the court to confine his argument to the second point, and he cited *Re* Leeds Banking Company, *Ex parte* Prange.[5]

COCKBURN, C. J. I am of opinion that the rule should be discharged. There can be no doubt that, when the holder of a bill of exchange seeks to sue an indorser, he must give due notice of dishonor, if the bill when due is not met by the acceptor, and he must find out the indorser, or at all events use reasonable diligence to find out either his place of residence or place of business, if the bill has been indorsed in his way of business or trade; and, if the bill has been given or indorsed in the way of business, it is enough if the holder give notice of dishonor at the indorser's place of business.[6] In the present case, the notice was not given at the defendant's place of residence, but only at the office of the company of which the defendant was a director. We have to consider whether the office of the company was the place of business of the defendant, or at all events, looking at the circumstances under which the bill was given, whether the defendant authorized the plaintiff to treat the office of the company as his place of business for the purposes of the bill, or as the place where he would be likely to be found. The bill was given for a debt of the company of which the defendant was an acting director; and, when the plaintiff agreed to take the bill, he insisted that it should have the names of two directors as an additional security. The bill was accordingly drawn and accepted at the office of the company, and the defendant indorsed the bill at the office as a director of the company; and though he may have thought he had not made himself liable in his individual capacity, yet the bill was given to keep the affairs of the company straight, and the transaction took place at the office of the

[1] 1 Moo. & Rob. 520. [2] 1 Moo. & Rob. 543. [3] 8 Camp. 262.
[4] 12 East, 433. [5] 35 L. J. Ch. 33.

[6] Miller v. Hennen, 8 Mart. N. S. 587; State Bank v. Hennen, 4 Mart. N. S. 226; Edson v. Jacobs, 14 La. 494; La. Bank v. Mansker, 15 La. 115; Comm. Bank v. Gova 15 La. 113; Jacobs v. Turner, 2 La. An. 964; Kock v. Bringier, 19 La. An. 183; Mers v. Kaiser, 20 La. An. 377; Lord v. Appleton, 15 Me. 270; Mech. Association v. Place, 4 Duer, 212; Bank of Commonwealth v. Mudgett, 44 N. Y. 514; Phillips v. Alderson, 5 Humph. 403; McVeigh v. Old Dominion Bank, 26 Grat. 785 (*semble*), *accord*.

Conf. U. S. Bank v. Corcoran, 2 Pet. 121; Williams v. Brailsford, 25 Md. 126; Kleinmann v. Boernstein, 32 Mo. 311; Walker v. Stetson, 14 Oh. St. 89; Bank of West Tenn. v. Davis, 5 Heisk. 436. — ED.

company as a business transaction of the company. Under the circumstances, therefore, I think the defendant authorized the plaintiff to treat the office of the company as the place, in case the bill was not paid, at which the defendant would be found, or from which the notice of dishonor would be forwarded to him so as to reach him in due time: therefore, I think the office of the company was the place of business of the defendant with reference to this particular transaction, which was entirely for the business of the company. Upon the other point, it is unnecessary to give any decided opinion, though I am strongly inclined to think the plaintiff did not use reasonable diligence to find out the defendant's place of residence.

BLACKBURN, J. I am of the same opinion. No doubt when the holder, on the default of the acceptor, means to sue prior parties to the bill, he must give them due notice of dishonor, unless there are any circumstances to excuse it. And he would be excused if he could not find the indorser after due diligence in searching for him, and no place could be found at which to give the notice. In the present case, the plaintiff did not know the private residence of the defendant, and he made some attempts to find it out; but I think it at least very doubtful whether they were sufficient to excuse the want of notice, and I should be very unwilling to decide in favor of the plaintiff on this point. On the other point, the holder of a bill has fulfilled his duty if he sends the notice of dishonor to the place which the indorser held out as the place at which he is likely to be found for the purpose of receiving notice;[1] and, if the indorser has a place of business, it is sufficient to send it there, and the holder need not go to the indorser's place of residence. In the present case, Petersham was the defendant's place of residence, but it was not known to the plaintiff; and the facts were, that the company, of which the defendant was an acting director, being about to be sued for a debt due to the plaintiff, a compromise was effected on condition that two of the directors should put their names to a bill of exchange accepted on behalf of the company. Accordingly, the parties met at the company's office, 20 Great George Street, for the purpose; and the defendant, as one of the two directors, and because he was a director of the company for whose debt the bill was given, put his name on the bill as indorser. The plaintiff knew nothing of the defendant, except that he was a director of the company; and the transaction may be called a domiciling of the bill at the

[1] Shelton v. Braithwaite, 8 M. & W. 252; Peters v. Hobbs, 25 Ark. 67; Eastern Bank v. Brown, 17 Me. 356; Crowley v. Barry, 4 Gill, 194; Baker v. Morris, 25 Barb. 188; Morris v. Husson, 4 Sandf. 93; Farmers' Bank v. Battle, 4 Humph. 86; Carter v. Union Bank, 7 Humph. 548; Davis v. Tennessee Bank, 4 Sneed, 390, *accord*.

Conf. Lewiston Bank v. Leonard, 43 Me. 144. — ED.

company's office; and the defendant may, as it seems to me, be taken to have held out that he would be found there, so as to entitle the plaintiff to treat the office as the defendant's place of business for the purpose of the bill. It seems to me, therefore, on the best consideration that I can give, that the notice of dishonor was sufficient, inasmuch as the bill is made at and addressed to the company at 20 Great George Street, and the defendant indorses it there. I do not mean by any means to say that a director, indorsing a bill of exchange as surety for a company, thereby as a matter of course makes the place of business of the company his place of business, so as to make a notice of dishonor left there sufficient. But, under the circumstances of the case, I think it may be fairly said that the defendant, as it were, impliedly stated that the place of business of the company was the place where he was to be found.

LUSH, J. I am also of opinion that the notice of dishonor was sufficient. A notice is good if sent to the place of business of the indorser. Here the only business of the defendant was as a director of the company: this was a business bill of the company, and was indorsed by the defendant at the office of the company, and he indorsed it without inserting any other address than that already on the bill.

HAYES, J., concurred. *Rule discharged.*

BANK OF UTICA v. PHILIPS.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, OCTOBER, 1829.

[*Reported in* 8 *Wendell*, 408.]

THIS was an action of assumpsit, tried at the Oneida circuit in April, 1828, before the Hon. Nathan Williams, one of the circuit judges.

The defendant was the second indorser of a promissory note for $300, bearing date the 28th November, 1826, payable ninety days after date at the Bank of Utica where the note was discounted on the 2d December, 1826, the interest being taken in advance. When due, the note was protested for non-payment, and notice sent per mail, directed to the defendant at the village of Geddes in the county of Onondaga, where the note purported to have been given, and where the defendant resided when it was discounted. In the month of December, 1826, after the note was discounted, the defendant had removed to the village of Fulton in the county of Oswego, where he has since continued to reside. At the time the note was discounted, it was known to the officers of the bank that the defendant resided at Geddes, and a memorandum of his then place of residence was made on the note, in conformity to the uniform practice of the bank in such cases. When the note fell due, no inquiry was made as to the defendant's residence, the officers of the bank having no knowledge of his removal.

On this state of facts, the counsel for the defendant insisted that the defendant was entitled to a verdict, — the notice of protest was insufficient to charge him as indorser, not being directed to his place of residence, — and requested the judge so to charge the jury. The judge ruled that the notice was sufficient. The defendant excepted. The jury found for the plaintiffs, and the defendant now moved for a new trial.

J. A. Spencer, for the defendant.[1]

G. C. Bronson (Attorney-General), for the plaintiffs.

BY THE COURT, MARCY, J. Was the notice, under the circumstances of this case, sufficient to charge the defendant? It appears to me that the question of diligence cannot arise except in cases where the party knows or ought to know that there is occasion for its exercise. Ought the holders of this note, when it fell due, to have known that intermediate its discount and maturity the indorser had changed

[1] The arguments of counsel have been omitted, and only so much of the case is given as relates to the question of notice. — ED.

his residence? They had no reason to expect such an event, and of course no considerations of diligence could have prompted them to institute any inquiry in relation to it. Where the place of an indorser's residence is established at the time when a note having the usual time of bankable paper to run is discounted, and is at such a distance from the place of payment as to repel the presumption that a removal (in case it happens before the note falls due) would come to the knowledge of the holders, and no actual knowledge is brought home to them, a notice of demand and non-payment directed to such place of residence is sufficient, although the indorsee has in fact, in the mean time, become a resident of another place.

Such I take this case to be, and am therefore of opinion that the notice given to the defendant was sufficient to charge him as indorser. *Judgment for plaintiffs.*[1]

PIERRE CHOUTEAU, Jr., v. DANIEL WEBSTER.

T 424

In the Supreme Judicial Court, Massachusetts, March Term, 1843.

[*Reported in* 6 *Metcalf*, 1.]

Assumpsit by the indorsee against the indorser of two promissory notes, dated at the city of New York, March 24, 1837, and payable at the Merchants Bank in that city on the 1st of October, 1837. The case came before the court on the following agreed statement: On the last day of grace, viz. on the 4th of October, 1837, about three o'clock P. M., the notes were delivered by the holders thereof to T. W. Christie, a notary public residing in the city of New York, who straightway presented each of them to the paying teller of said bank, while the bank was open for the transaction of business, and demanded payment of the same of the said teller, who refused to pay them, or either of them, for want of funds of the makers. The notes were duly protested by said notary for non-payment; and written notices, signed by him, of the protest of each of said notes, and that the holders looked to the indorsers for payment thereof, were by said notary, by direction of the holders, put into the post-office in said city on the morning of the 5th of said October. The notices to the defendant, as first indorser of

[1] McMurtrie v. Jones, 3 Wash. 206; Ward v. Perrin, 54 Barb. 89; Harris v. Memphis Bank, 4 Humph. 519, *accord*.

Conf. Planters' Bank v. Bradford, 4 Humph. 89. — Ed.

each of said notes, were directed to him at Washington in the District of Columbia. The defendant's general domicile and place of business was in Boston, where he at all times had an agent, who had the charge and management of his business affairs in his absence; but, from the 7th of September, 1837, to the 16th of October following, the defendant was at said Washington, attending to his duties as a senator in Congress from this Commonwealth, during the extra session held that year.

Letters from New York usually reach Washington in about forty-eight hours, in the regular course of the mail. Such letters as are addressed by mail to members of the senate, during the session of Congress, are taken from the Washington post-office by officers of the senate appointed for that purpose or charged with the duty, and delivered to the members in their places, when the senate is actually in session, and on other days are delivered by those officers to members at their lodgings; and such was the usual course with regard to letters addressed by mail to the defendant during the extra session of September and October, 1837.

The making and indorsement of the said notes, and the consideration thereof, are admitted. All matters of fact as well as of law involved in the case are submitted to the decision of the court, who may make such inferences from the facts stated as a jury would be authorized to make. If any facts are contained in this statement which it would not be competent for either party, on a trial before a jury, to prove or put into the case, upon the other party's objecting thereto, such facts shall be stricken out by the court, and neither party shall be in any way prejudiced by their having been inserted herein. And if, in the opinion of the court, it shall be necessary to the rights of either party, the case may be opened for the introduction of evidence touching facts that may be deemed material, whether they are embraced in this statement or not. But if no further evidence or facts shall be introduced, and the court are of opinion that the facts stated would justify a jury in finding a verdict for the plaintiff, a default is to be entered, and judgment rendered thereon for the plaintiff; otherwise, the plaintiff is to become nonsuit.

W. J. Hubbard & Watts, for the plaintiff.

J. P. Rogers & Healy, for the defendant.[1]

SHAW, C. J. It is admitted that these notes were duly made and indorsed; that they were seasonably presented for payment at the bank in New York, where by their terms they were payable, and payment refused; that notice thereof, in due form, was seasonably prepared by the proper officer, and put into the post-office; and the

[1] The arguments of counsel have been omitted. — ED.

only question is, whether, under the circumstances stated, it was rightly addressed to the defendant at Washington.

The mercantile law regulating the liabilities of parties to notes and bills does not require proof of actual notice of dishonor to an indorser, in order to charge him; but reasonable care and diligence in giving such notice.

The inference is very strong from the facts stated — as strong, perhaps, as mere circumstantial evidence could make it — that the notice actually reached the defendant at Washington. He was a senator of the United States; the senate was then in session; and such precautions were taken, in regard to letters addressed to senators, as to insure their delivery with promptness and certainty.

The ground relied upon to show that such notice was not sufficient is that the defendant's general domicile and place of business were in the city of Boston, where he had at all times an agent, who had the charge and management of his affairs. But it does not appear that he had made any request to have notices sent to him at Boston, or that any actual or constructive notice was had by the holder of these notes that he had an agent at Boston. This fact, therefore, must be considered immaterial. The defendant, though his domicile was at Boston, was actually resident at Washington, in discharge of his public duties as a senator, at a session of Congress called by public proclamation, and continued until after the time at which this notice was sent; so that the place where he might be presumed to be actually residing was fixed and well known by the nature of these duties. Under these circumstances, the court are of opinion that notice to the defendant by mail, addressed to him at Washington, was good and sufficient notice of the dishonor of these notes.

This decision is founded on the circumstances of the particular case, and may be varied by other facts. It is not like the case of a merchant stopping for a day or two at a hotel or watering-place, or on a journey of business or pleasure; though we are not prepared to say that actual personal notice to an indorser at such a place would not be sufficient, but of this we give no opinion.[1]

Nor is it like the case of a banker or merchant, having extensive dealings in negotiable securities, having an open, fixed, and well-known establishment and place of business, with agents having the custody of his funds, the keeping of his accounts, and generally charged with the transaction of his business in his absence. Such circumstances might perhaps amount to constructive notice to the holders of such securities,

[1] A notice given at or addressed to an improper place is sufficient, if actually received by the drawer or indorser in due time. U. S. Bank v. Corcoran, 2 Pet. 121; Bradley v. Davis, 26 Me. 45. — Ed.

that such was the indorser's place of business, and of his request and direction that notice should be addressed to him there. It might, in this view, be sufficient to show that notice so given would be good and sufficient, though it would still be open to the question whether other notice would not be equally good.

The fact of domicile is one circumstance only in determining where notice shall be given. A man may retain his domicile at a place, though in fact personally absent therefrom, and absent with his family for years. Such is the condition of a president of the United States or cabinet minister residing at Washington, or of an ambassador in a foreign country. His domicile is not thereby changed; but yet we cannot doubt that notice to such public officer, at the place of his actual residence, to which for the time being he is fixed by his public duty, would be good notice. Yet the only distinction between a president of the United States and a senator is that the residence of the former at Washington is somewhat more protracted and uninterrupted by the intervals between sessions of Congress than that of the latter.

We place no great reliance, in this decision, upon another rule which seems to be well established, and to embrace the present case; namely, that notice at a post-office where the party usually receives his letters, though not the place of his domicile, is good notice. Reid *v.* Payne.[1] It is conformable to the more general rule, sustained by many authorities, that notice shall be so given and at such place that it will be most likely to reach the indorser promptly. Bank of Columbia *v.* Lawrence, U. S. Bank *v.* Carneal.[2] *Judgment for the plaintiff.*[3]

MERCER *v.* LANCASTER.

IN THE SUPREME COURT, PENNSYLVANIA, MARCH TERM, 1847.

[*Reported in* 5 *Barr*, 160.]

IN error to the Common Pleas of Chester County.

April 7. This was an action against Mercer as indorser of a promissory note, the execution and protest of which, with the notary's recital of notice by depositing the same in the West Chester post-office, were proved by the plaintiff.[4]

[1] 16 Johns. 218. [2] 2 Pet. 553.

[3] Graham *v.* Sangston, 1 Md. 59; Young *v.* Durgin, 15 Gray, 264; Seneca Bank *v.* Neass, 3 Comst. 442; Marr *v.* Johnson, 9 Yerg. 1 (*semble*); Bayly *v.* Chuff, 16 Grat 284 (*semble*), *accord*.

Walker *v.* Tunstall, 4 Miss. 259, *contra*. But see 10 Miss. 688, s. c. — ED.

[4] Only so much of the case is given as relates to the question of notice. — ED.

The defendant proved he lived three-quarters of a mile from Darlington Corner, at which there was a post-office; and three miles from West Chester, at which place the notice of dishonor had been addressed to defendant.

The plaintiff then proved, by a notary, that defendant had once received a notice of protest sent to him at the West Chester post-office. The postmaster at that place stated defendant had been in the habit of receiving a city newspaper, which was occasionally discontinued through that office; that, during the year in which the note matured, he called more frequently than since, and had once declined receiving a drop letter in that office from the officers of the collecting bank. He could recollect having given him two letters within three and a half years during which he held the office.

Bell, P. J., told the jury that, as to the notice, though the general rule required notice to be sent to the office nearest the indorser's residence, yet if he had uniformly been in the habit of using another post-office as more convenient, and of receiving his letters or newspapers through such office, notice might be sent there. Whether that was his habit was for the jury.

The plaintiff excepted to these directions.

Lewis, for plaintiff in error.

Hemphill, contra.

April 16. ROGERS, J. It is contended the court erred in leaving it to the jury to determine whether it was not the ordinary habit of Mercer to look to the post-office at West Chester as his medium of communication from abroad, and of calling there for his letters and newspapers, there being no evidence that such was the fact. To this direction we perceive nothing amiss. For although there was a post-office nearer his dwelling than the one used in this instance, yet, if he was in the habit, as the jury have found, of using that as more convenient for his business, it was an accommodation to the defendant, as it was more likely to reach him if the notice was put into the West Chester office, and of course the defendant has no just right to complain. Indeed, had it been sent to the post-office nearest his dwelling, it is likely the complaint would have assumed a different aspect, and certainly with as good reason. It is impossible for us to say there was no evidence of the fact proper to be submitted to the jury; for although there may have been a temporary suspension of the habit of doing his business at the latter post-office, yet it was afterwards resumed, and we have no reason to believe it was known to others that his manner of doing his business in this particular had ever been suspended. When the facts are admitted, notice of non-payment is a question of law, but

the jury must find the facts; and in this case they were left to them, under a proper direction from the court. Although the case may not require an expression of opinion on this point, yet I am inclined to believe that, as the case stands, notice would be good, whether given through one or the other medium. *Judgment affirmed.*[1]

RAWDON v. REDFIELD.

IN THE SUPERIOR COURT, NEW YORK, NOVEMBER, 1848.

[*Reported in* 2 *Sandford*, 178.]

CASE subject to the opinion of the court. The cause was by consent argued before the Chief Justice alone, in whose opinion the facts are sufficiently stated.

A. W. Clason, Jr., for the plaintiff.

P. T. Woodbury, for the defendant.

BY THE COURT, OAKLEY, C. J. This is an action on a bill of exchange, drawn by a party in the city of Troy on a firm in this city, payable to and indorsed by the defendant, then residing at Troy, and which was subsequently indorsed to the plaintiff. The bill was accepted, and at its maturity was not paid. Issue was taken on the presentment of the bill for payment, and on the service of notice of protest and non-payment on the defendant.

There is no question as to the presentment of the bill for payment. The difficulty, if any, arises on the proof of the service of the notice of protest; it being claimed that it was not served at or sent to the place of the defendant's residence. It appears that he is a single man, and for several years up to the first of May, 1847, was in business at Troy. He then closed his business at Troy, and concluded to remove to this city, and about the first of July entered into copartnership for the transaction of business here, notice of which was published in one or more of the city papers on the 15th day of July. The defendant's name had not, however, appeared in the firm at its place

[1] U. S. Bank v. Carneal, 2 Pet. 543; Follain v. Dupré, 11 Rob. (La.) 454; La. Bank v. Tournillon, 9 La. An. 182; Citizens' Bank v. Pugh, 19 La. An. 43; Shelburne Bank v. Townsley, 102 Mass. 177; Reid v. Payne, 16 Johns. 218; Geneva Bank v. Howlett, 4 Wend. 328; Montgomery Bank v. Marsh, 8 Seld. 481; U. S. Bank v. Lane, 8 Hawks 453; Farmers' Bank v. Battle, 4 Humph. 86, *accord*.

Mechanics' Bank v. Compton, 3 Rob. (La.) 4; Nicholson v. Marder, 3 Rob. (La.) 242, *contra*.

Conf. Weakly v. Bell 9 Watts. 273. — ED.

of business, when the bill of exchange matured; and it was not to be found in the city directory.

The notary, on protesting the bill, looked into the directory, and, not finding the defendant's name there, inquired of the acceptor and the holder of the bill as to the residence of the defendant. Both of them informed the notary that he lived at Troy; and the notary sent a notice of protest by mail, addressed to him at that place.

The question is whether due diligence was used by the notary and whether the notice of protest was sufficient. The leading cases to which I was referred were Ransom *v.* Mack[1] and Spencer *v.* The Bank of Salina,[2] with several others there cited.

The principle to be extracted from the authorities is that, if the notary inquire of persons who from their connection with the transaction are likely to know the residence of the indorser, and are not interested to mislead the notary, and he acts on the information thus obtained, it is due diligence on his part. That was done here: there was no interest to mislead either in the acceptor or the holder. The notary must make reasonable efforts to ascertain the residence of the parties entitled to notice, when it does not appear on the face of the instrument. If that be done in good faith, and he act accordingly in giving the notice, it is enough, and the party will be charged.

Judgment for plaintiff.[3]

[1] 2 Hill, 587. [2] 3 Hill, 520.

[3] See to the same effect Harris *v.* Robinson, 4 How. 336; Lambert *v.* Ghiselin, 9 How. 552; Garver *v.* Downie, 38 Cal. 176; Bartlett *v.* Isbell, 31 Conn. 296; Barker *v.* Clark, 20 Me. 156; Columbia Bank *v.* Magruder, 6 Har. & J. 172; Wood *v.* Corl, 4 Met 208; Cabot Bank *v.* Russell, 4 Gray, 167; Brighton Bank *v.* Philbrick, 40 N. H. 506; Chapman *v.* Lipscombe, 1 Johns. 294; Utica Bank *v.* Davidson, 5 Wend. 587; Utica Bank *v.* Bender, 21 Wend. 643; Carroll *v.* Upton, 2 Sandf. 171; Gawtry *v.* Doane, 51 N. Y. 84; Requa *v.* Collins, 51 N. Y. 144; Dunlap *v.* Thompson, 5 Yerg. 67; Farmers' Bank *v.* Harris, 2 Humph. 311, in which cases due diligence was used, although the notice was given at or sent to the wrong place. In Moore *v.* Hardcastle, 11 Md. 486; Whitridge *v.* Rider, 22 Md. 548; Phipps *v.* Chase, 6 Met. 491 (*semble*); Utica Bank *v.* DeMott, 13 Johns. 432; Greenwich Bank *v.* De Groot, 7 Hun, 210; Baer *v.* Leppert, 12 Hun, 516; Planters' Bank *v.* Bradford, 4 Humph. 39, due diligence was not used.

If diligent inquiry does not disclose the place of business or residence of the indorser, it has been held sufficient to send a notice to the place where the bill was drawn or the note made: Branch Bank *v.* Peirce, 8 Ala. 321; Preston *v.* Dayson, 7 La. 7; Sasscer *v.* Whitely, 10 Md. 98; Utica Bank *v.* Davidson, 5 Wend. 587 (*semble*); or to deposit a notice addressed to the indorser in the post-office of the holder's town: Vigers *v.* Carlon, 14 La. 89; Peet *v.* Zanders, 6 La. An. 364; Jamison *v.* Polhaus, 26 La. An. 63; Staylor *v.* Williams, 24 Md. 199; Hunt *v.* Maybee, 3 Seld. 266. Conf. Hodges *v.* Galt, 8 Pick. 251; Peirce *v.* Pendar, 5 Met. 352; Gilchrist *v.* Donnell, 53 Mo. 591; Spencer *v.* Salina Bank, 3 Hill, 520; Lawrence *v.* Miller, 16 N. Y. 235; Haly *v.* Brown, 5 Barr. 178, in which cases due diligence was not used. —Ed.

NATHANIEL MORTON *v.* DAVID W. WESTCOTT.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1851.

[*Reported in* 8 *Cushing*, 425.]

THIS was assumpsit by the assignee in insolvency of Henry W. Coggeshall, on a promissory note, dated June 3, 1847, signed by Charles Richmond, payable in six months to the defendant, and by him indorsed in blank.

At the trial in the Court of Common Pleas before Merrick, J., the plaintiff, to prove his case, called James P. Ellis, a notary public, who testified that on the evening of the 6th of December, 1847, he received the note from the cashier of the Bristol County Bank in Taunton, for protest for non-payment; that he applied at the place of business of the maker, and finding it closed, and no one there to pay the note, he protested it, and put into the post-office a notice addressed to the defendant at Dighton; that he did not know where the defendant lived; that he made no inquiries, but that the cashier directed him to notify the defendant at Dighton.

In defence, it was proved that there were two post-offices in Dighton, — one called Dighton, and the other North Dighton office; that the defendant lived several miles from both offices, but about one mile nearer to that at North Dighton; that he carried on the White Birch Factory, which was nearer to the North Dighton office; and he produced evidence that many letters and papers were addressed to him by his correspondents at the North Dighton office, and that he took and received them from that office. The postmaster at North Dighton testified that the persons in the neighborhood of White Birch Factory pretty much all got their letters at North Dighton; that the other post-office was near Dighton lower four corners. But no evidence was offered by either party to show whether letters and papers were or were not addressed to the defendant by his correspondents at the Dighton office, or whether the defendant did or did not receive such letters and papers from that office.

The defendant also called Henry W. Coggeshall of Taunton, who testified that he owned the note when it became payable and until he became insolvent, and that it was in the bank for collection; that he knew at that time that the defendant was carrying on business at North Dighton, and that, if inquired of, he should have directed the notice to him at North Dighton.

The judge instructed the jury that the general rule in relation to

indorsers was that seasonably placing a letter containing the notice in the post-office, directed to the town in which the indorser resides, is a sufficient notice;[1] but if he resides in a town in which there are two or more post-offices, then the letter may be directed to the town, without specifying to which office it should go, unless upon reasonable inquiry it could be ascertained that he was accustomed to receive his letters at one of the offices only in the town, in which latter case it should be sent to the accustomed office, and not elsewhere. And, in reference to this particular case, the judge instructed the jury that it was a question of fact for them to consider and determine, upon the whole evidence submitted to them, whether the defendant was accustomed to receive his letters from the North Dighton office only; and that if, upon all the evidence, it was left in doubt and uncertainty whether the defendant was or was not accustomed to receive his letters from each and both the offices in Dighton, the letter from the notary having been directed to Dighton, without designation of the particular office to which it was to go, the notice must be held to be sufficient. But if they were satisfied that the defendant was accustomed to receive his letters only from the North Dighton office, and that that fact could, upon reasonable inquiry, have been ascertained, then the notice must be held to be insufficient, and their verdict must be for the defendant.

The verdict was for the plaintiff, and the defendant alleged exceptions.

H. Williams, for the defendant.

E. H. Bennett, for the plaintiff, cited Bayley on Bills (2d Am. ed.), 277, note; Munn *v.* Baldwin,[2] Shed *v.* Brett;[3] Story on Notes, §§ 316, 343; Bank of Manchester *v.* Slason,[4] Remer *v.* Downer.[5]

SHAW, C. J. It seems to the court that the instruction of the judge was correct, well adapted to the circumstances of the case, and cautiously qualified and guarded. It seems well settled that, when there are two post-offices in a town, notice by letter to an indorser, addressed to him at the town generally, is sufficient, unless the party addressed has been generally accustomed to receive his letters at one of the offices in particular, and to have his letters addressed to him there by his correspondents. Such being the rule, the plaintiff proves his case *prima facie*, by proving notice by letter addressed to the de-

[1] Tyson *v.* Oliver, 43 Ala. 455; Mainer *v.* Spurlock, 9 Rob. (La.) 161; Nott *v.* Beard, 16 La. 308; Farmers' Bank *v.* Battle, 4 Humph. 86; Dunlap *v.* Thompson, 5 Yerg. 67; Marr *v.* Johnson, 9 Yerg. 1; Commercial Bank *v.* Strong, 28 Vt. 316; Rand *v.* Reynolds, 2 Grat. 171, *accord.* — ED.

[2] 6 Mass. 316.

[3] 1 Pick. 401.

[4] 13 Vt. 334, 340.

[5] 23 Wend. 620.

fendant at the town generally. If, then, the defendant would rebut this presumption of fact, and bring himself within the exception, it lies on him to prove that he did usually receive his letters at one office only, and that this might have been known by reasonable inquiry at the place where the letter was mailed.[1] Without this proof, it may be true that the defendant received his letters habitually as well at one post-office as the other, and then the plaintiff's *prima facie* proof remains unrebutted, and he must prevail.

Exceptions overruled.[2]

BEALE AND ANOTHER v. PARRISH.

IN THE COURT OF APPEALS, NEW YORK, DECEMBER, 1859.

[*Reported in* 20 *New York Reports*, 407.]

APPEAL from the Supreme Court. Action to recover the amount of a promissory note made by Parrish & Utley, dated Sept. 20, 1853, for $500, payable at the American Exchange Bank, New York, six months after date, to the order of the makers, and indorsed by them and the appellant. The complaint alleged that the note was duly presented for payment, and payment refused, and that the defendants were duly notified thereof. The appellant, by his answer, denied the service of notice upon him. The cause was tried at the New York circuit without a jury. It appeared upon the trial that the makers of the note, at its date, resided at Dunkirk, and were doing business there as partners. The plaintiffs resided in New York, engaged in business there as partners. The appellant resided, and had resided for a number of years, in Canandaigua. The makers of the note became indebted to the plaintiffs, made the note in suit, obtained the indorsement of the defendant and remitted the same to the plaintiffs, to apply on their debt to them. The plaintiffs, before the note became due, got it discounted by the Chemical Bank in New York, and indorsed the same to the bank. The bank, when the note became due, placed the same in the hands of a notary, for the purpose of demanding payment and giving notice to the indorsers. The notary demanded payment at the place where the note was payable, and payment was refused. He then protested the note, and upon the next day made

[1] In Roberts v. Taft, 120 Mass. 169, the defendant, having rebutted this presumption, obtained judgment. — ED.

[2] Downer v. Remer, 21 Wend. 10; 23 Wend. 620, s. c. (overruling Cuyler v. Nellis, 4 Wend. 398); Manchester Bank v. Slason, 18 Vt. 334, *accord*.

Becnel v. Tournillon, 6 Rob. (La.) 500, *contra*.— ED.

inquiries at the Chemical Bank as to where the appellant resided, and where notice was to be served on him. The officers of the bank answered that they did not know. On the same day, he served notice upon the plaintiffs, by delivering the same to Melick, one of their firm, and asked him where he should serve notice on the appellant. Melick answered that his residence was either Dunkirk or Buffalo, he did not know which, and wished a notice sent to him at both places, to make a sure thing of it. The notary directed notice to him at both places, and deposited them in the post-office. It further appeared that the note, when sent to the plaintiffs, was enclosed in a letter to them, written by the makers, in which it was stated that the appellant resided at Canandaigua; and also that one of the plaintiffs, Mr. Beale, was informed before the note became due, by one of the makers, that the appellant resided at Canandaigua. The plaintiffs paid the amount of the note, and took it from the Chemical Bank before the commencement of the suit. Judgment was given for the plaintiffs, against the appellant, for the amount of the note, which was affirmed at general term upon appeal, and the defendant appealed to this court.

James C. Smith, for the appellant.

John C. T. Smidt, for the respondent.

GROVER, J. The first question necessary to be considered in this case is whether due diligence was used by the notary employed by the Chemical Bank to ascertain the residence of the defendant, so as to excuse the service of notice upon him as required by law, in favor of the bank, the holder of the note. He inquired at the bank, and ascertained that the officers did not know where he resided or where notice should be served upon him. He then inquired of Melick, one of the plaintiffs, and one of the immediate indorsers to the bank, and was informed by him that the defendant resided either at Dunkirk or Buffalo, and requested that notice might be directed to him at both places, so as to make a sure thing of it. The notary accordingly deposited the proper notices to the defendant in the post-office at New York, addressed to him at each of those places. I think that was sufficient to enable the bank to recover against the defendant, although his actual residence was at Canandaigua. Ransom *v.* Mack.[1] In this case, it was held that where inquiry was made of the second indorser as to the residence of the first, and he assumed to know his residence, and informed the notary thereof, who served the notice accordingly, that this was sufficient to charge him, although he resided at a different place. The only difference between that case and the one before the court is that in this case the indorser informed the notary that the defendant resided in one of two places. He assumed to be certain to

[1] 2 Hill, 588.

this extent; and the notary addressed a notice to the defendant at both the places named, rendering it equally certain to reach him as though but one place had been named, and notice had been directed there. In the Bank of Utica v. Bender,[1] it was held that a notice sent by mail to the place designated as the residence of the indorser of a bill of exchange by the drawer, for whose accommodation the bill was indorsed and for whose benefit it was discounted, was sufficient to charge the indorser, although his residence was at a different place. See also Catskill Bank v. Stall.[2] These cases proceed upon the principle that a party through whose hands negotiable paper has passed is presumed to know the residence of the party from whom he received it and the prior parties. They are, therefore, proper sources to which to apply for information; and, when applied to and assuming to know, information given by them may with safety be acted upon.

In this case, the plaintiffs were duly charged as indorsers to the bank. They were liable as such to pay the note. Having paid and taken the note from the bank, they are presumed to have paid it in discharge of that liability. They then became the holders of the note, invested with the right to resort to prior parties for payment, provided such parties had been duly charged by the service of the requisite notice. A notice given by the holder will enure to the benefit of the other parties to the bill or note. Stafford v. Yates,[3] Mead v. Engs.[4] This is upon the ground that the object of the notice is to enable the party entitled to notice to take the necessary steps to protect himself from loss; and where notice is actually served by any party to the paper, as required by law, this object is accomplished. Not so, however, where the notice is not so served, but the service is excused upon the ground of inability to ascertain the proper place for service, after using due diligence to learn it. In such case, the indorser is holden, although deprived of what the law deems an essential benefit to him. Inability to discover the residence of the indorser excuses the proper service only so long as such inability continues. When the residence becomes known to the party wishing to hold the indorser, it is his duty then to be diligent in making service. Chitty on Bills, 493. Had the bank continued to hold the note in suit, knowing that the only notice of dishonor to the defendant had been directed to Dunkirk and Buffalo, and had it at any time learned that he resided at Canandaigua, it would then have been necessary for it to have served notice there, in the same manner as though his real residence had been known to the bank when the note became due. The

[1] 21 Wend. 643.
[2] 15 Wend. 364.
[3] 18 Johns. 327.
[4] 5 Cow. 303

excuse for not serving notice would have ceased, and it could no longer be held that due diligence had been used, unless service was made.[1] The law will go no further than necessity requires. The same rule would be applicable to a purchaser from the bank. If this be so, the plaintiffs cannot recover. The case shows that some of them knew the residence of the defendant. That information was contained in the letter enclosing the note to the plaintiff, and was also given to Mr.

[1] But see Lambert v. Ghiselin, 9 How. 552, *contra*. In this case, Taney, C. J., who delivered the opinion of the court, said, p. 558: —

"We have already said that the liability of the indorser was fixed by the notice sent to Nottingham. The plaintiffs had acquired a right of action against him by this notice, and might have brought their suit the next day. Could that right be devested by the information which was subsequently given to them? We think not, and that all of the cases in relation to this subject imply the contrary. The books are full of cases where mistakes of this kind have been committed, and suits afterwards brought when the residence of the party was discovered. Yet it does not seem to have been supposed in any of them that a second notice was necessary, nor are we aware that such a point has ever been raised. Yet if a notice thus given, after diligent inquiry, is not equivalent to actual notice, knowledge subsequently obtained would be a defence to the action, even if the holder had brought suit before he learned what was the nearest or usual post-office of the defendant.

"The case of Firth v. Thrush, 8 Barn. & Cres. 887, which was much relied on in the argument, depended upon different principles. In that case, the holder knew that notice had not been given to the indorser. He had been engaged in making inquiries for his residence, without being able to obtain any information upon which he might have acted. And the question there was not whether a second notice should be given, but whether due diligence was used in sending the first.

"The rule contended for by the defendant would produce much uncertainty and difficulty in transactions of this kind. For, if a second notice must be given, is it to be required in all cases where there has been an error in the information as to the defendant's post-office? Certainly, the practice of the courts has been otherwise. And, if it is not to be required in all cases, it would be impossible to fix any certain limits as to time or circumstances. The subsequent information might come to him casually, when his mind was occupied with other engagements; he might not confide in it as much as in that which he had before received; it might come to him in a few days, or months might elapse before he obtained it. The rule would be loose and uncertain in its application, and constantly lead to litigation, where the residence of the indorser was unknown or an error committed as to his usual post-office. It would also be contrary, the court think, to the usages of commerce, and to the uniform practice in courts of justice. In the case of Harris v. Robinson, before referred to, no second notice was given, nor did the court intimate that any was necessary.

"The law does not require actual notice. It requires reasonable diligence only, and reasonable efforts, made in good faith, to give it. And if sufficient inquiries have been made, and information received upon which the holder has a right to rely, a mistake as to the nearest post-office or usual post-office does not deprive him of his remedy. He has done all that the law requires; and the notice, thus sent, fixes the liability of the indorser as effectually as if he had actually received it. This we think is the true rule, and the only one that can give certainty and security in transactions in commercial paper." — Ed.

Beale, one of the plaintiffs, verbally, by Stephen Parrish. The plaintiffs might at once have given the proper notice. One of the plaintiffs (Melick) knew that no notice for the defendant had been directed to Canandaigua. They could at once have served notice. This they neglected to do, and the defendant was thereby discharged.

If I am wrong in the above conclusion, — if the rule is that the holder having once used due diligence to learn the residence of the indorser, and having, as he supposes, ascertained it, and served notice accordingly, is not obliged to do any thing further, although he may afterwards learn that his information was erroneous, and learn the true residence, — it remains to inquire whether the plaintiffs can avail themselves of this right of the bank. As above remarked, they paid the note to the bank in discharge of their liability as indorsers, not as sureties for the defendant. The doctrine of subrogation, in favor of a surety, does not attach. Their suit is based upon the defendant's indorsement to them. To recover, it was necessary to show notice of dishonor served upon the defendant by some party to the note, or that there was a legal excuse for the omission. Such excuse was shown so far as the bank was concerned, but none whatever as to the plaintiffs. They could have at once served the proper notice upon the defendant, upon receipt of notice by them from the bank. While it is settled that notice by the holder to the defendant would have enured to the benefit of the other indorsers, there is no authority holding that an excuse for the omission to serve by the holders shall extend to other parties for whom there is no such excuse. Upon both the above grounds, I think the judgment should be reversed, and a new trial ordered.

JOHNSON, C. J., expressed no opinion. All the other judges concurring, *Judgment reversed, and new trial ordered.*

SECTION II. — *Continued.*

Notice of Dishonor — (continued).

(*d*) By whom Notice should be given.

STEWART *v.* KENNETT.

At Nisi Prius, coram Lord Ellenborough, C. J., June 8, 1809.

[*Reported in* 2 *Campbell*, 177.]

Action against the defendant as indorser of a bill of exchange.

The only question was whether the defendant had received due notice of the bill being dishonored for non-payment.

To prove this, a witness of the name of Cutler was called, who swore that he had been employed by the original parties to the bill to get it discounted; that, when it became due, it was in the hands of one Abbott, to whom the plaintiff had indorsed it; that the day after the witness met the defendant, and told him it had not been paid; that the defendant asked who held it, and that the witness answered, it lies at Messrs. Bonds', Abbott's bankers.

Park, for the defendant, objected that this was insufficient; that knowledge is not notice, and that the intimation of the dishonor of the bill must come from the holder of it.

Garrow, contra, contended that the notice given by Cutler not only possessed the defendant of the same information, but placed him in the same situation as if it had come directly from the indorsee. What was there to hinder him from immediately taking up the bill and resorting to the acceptor, the drawer, or prior indorsers? Besides, Cutler, having been employed to get the bill discounted, might well be considered as an authorized agent to give the notice; and, even if he had no original authority to give the notice, the plaintiff adopted it by bringing this action.

Lord Ellenborough. If you could make Cutler the agent of the holder of the bill, the notice would be sufficient;[1] but in reality he was a mere stranger. The bill when dishonored lay at the bankers of Abbott, with whom Cutler had no sort of connection. But the notice

[1] Harris *v.* Robinson, 4 How. 336; Greene *v.* Farley, 20 Ala. 322; Swayze *v.* Britton, 17 Kas. 625; Shed *v.* Brett, 1 Pick. 401; Remick *v.* Robbins, 28 Mo. 339; Mo. Bank *v.* Vaughan, 36 Mo. 90; Utica Bank *v.* Smith, 18 Johns. 230; Worden *v.* Nourse, 36 Vt. 756, *accord.*

Conf. Smedes *v.* Utica Bank, 20 Johns. 372; 3 Cow. 662, s. c. — Ed.

must come from the person who can give the drawer or indorser his immediate remedy upon the bill: otherwise, it is merely an historical fact. In this case, Cutler was not possessed of the bill, and had no control over it. The defendant therefore is not proved to have had any legal notice of the dishonor of the bill, and is discharged from the liability he contracted by indorsing it.

Plaintiff nonsuited.[1]

JAMESON AND OTHERS v. SWINTON.

IN THE COMMON PLEAS, JANUARY 24, 1810.

[*Reported in* 2 *Taunton*, 224.[2]]

Best, Serjt., moved for a rule *nisi* to set aside the verdict for the plaintiff, which had been obtained upon the trial of this cause at the sittings after the last term before Lawrence, J. The action was brought upon a bill of exchange. The defence was that due notice had not been given of the dishonor of the bill, which took place on the 10th of July. At four in the afternoon of the same day, notice was given to Elsham, the last indorser, who lived at Back Hill, Holborn. On the 11th, about eight or nine at night, Elsham gave notice to Swinton, who lived at Islington.

LAWRENCE, J., was of opinion that Elsham gave the notice soon enough to enable him to recover against Swinton; and that if Elsham might recover against Swinton, Jameson, from whom Elsham had the bill, might also recover against Swinton.[3]

Best contended that the notice must be given within the hours of business, in the same manner as a bill must be presented for payment within those hours; but the court held that that rule prevailed only

[1] East v. Smith, 4 D. & L. 744; Chanoine v. Fowler, 3 Wend. 173; Brower v. Wooten, 2 Tayl. 70, *accord*.

Conf. Walker v. Mo. Bank, 8 Mo. 704. — ED.

[2] 2 Camp. 373, s. c. — ED.

[3] Stafford v. Yates, 18 Johns. 327; Abat v. Rion, 9 Mart. 465; Wilcox v. Mitchell, 5 Miss. 272; Young v. Durgin, 15 Gray, 264; Marr v. Johnson, 9 Yerg. 1, *accord*.

To the same effect are, Wilson v. Swabey, 1 Stark. 34; Newen v. Gill, 8 C. & P. 367; U. S. Bank v. Goddard, 5 Mas. 366; Davis v. Hanly, 12 Ark. 645; Williams v. Matthews, 3 Cow. 252; Mead v. Engs, 5 Cow. 303 (*semble*); Safford v. Wyckoff, 1 Hill, 11; Cowperthwaite v. Sheffield, 1 Sandf. 416, in which cases the notice was given by an intermediate party to the bill. *Ex parte* Barclay, 7 Ves. 597, *contra*, is no longer law. — ED.

if a bill was accepted payable at a banker's, in which case it must be presented for payment within the hours of business,[1] and refused the application.

ROSHER AND ANOTHER v. KIERAN.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 12, 1814.

[*Reported in* 4 *Campbell*, 87.]

THIS was an action by the plaintiffs, as indorsees, against the defendant, as drawer of a bill of exchange for £1,000, dated Dundalk, 26th of February, 1814, payable to the order of the drawer at ninety days after date, and accepted by Thomas Rowcroft at Smith, Payne, & Smith's, bankers, in London.

The question was whether the defendant had received due notice of the dishonor of the bill.

The bill became due on the 30th of May, when it was presented for payment, and dishonored. On the same day, the acceptor wrote a letter to the drawer, stating that he had not been able to pay it, and that it was then in the hands of the plaintiffs.

LORD ELLENBOROUGH held this notice from the acceptor sufficient, and *The plaintiffs had a verdict.*[2]

CHAPMAN v. KEANE.

IN THE KING'S BENCH, MAY 7, 1835.

[*Reported in* 8 *Adolphus & Ellis*, 198.]

ASSUMPSIT by indorsee against drawer of a bill of exchange, averring in the usual form presentment to the drawee, non-payment by him, and notice to the defendant. Plea, that the defendant had not due notice of non-payment by the drawee, tendering issue thereupon.

[1] Bancroft v. Hall, Holt, N. P. 476 (*semble*); Adams v. Wright, 14 Wis. 408 (*semble*), *accord*.

See Bonner v. New Orleans, 2 Woods, 135; Stanley v. Bank of Mobile, 28 Ala. 652. — ED.

[2] Shaw v. Croft, Chitty, Bills, 10th ed. 338, n.; First Nat. Bank v. Ryerson, 28 Iowa, 508; Brailsford v. Williams, 15 Md. 150; Glasgow v. Pratte, 8 Mo. 336, *accord*.

Chanoine v. Fowler, 3 Wend. 178 (*semble*), *contra*.

Conf. Stanton v. Blossom, 14 Mass. 116; Cabot Bank v. Warner, 10 All. 522. — ED.

Joinder. On the trial before Tindal, C. J., at the Guilford summer assizes, 1834, it appeared that the plaintiff had indorsed the bill before it was due to one Wiltshire, who left it with the plaintiff's clerk in order that it might be presented at maturity to the drawee. It was dishonored upon presentment, whereupon the plaintiff's clerk gave notice to the defendant: the notice was regular in all respects, except that the clerk gave it in the name of the plaintiff, the indorsee, and not of Wiltshire. The plaintiff afterwards took up the bill from Wiltshire. It was objected that notice ought to have been given by the holder of the bill, whereas the holder, at the time of the notice, was Wiltshire. His lordship, being of this opinion, nonsuited the plaintiff. In Michaelmas term last, Law obtained a rule to show cause why the nonsuit should not be set aside, and a verdict be entered for the plaintiff.

Thesiger and *Platt* showed cause (May 6th).[1] In Tindal *v.* Brown,[2] it was held that notice of dishonor must be given by the actual holder; and the reason is that the party to whom the notice is given ought to know where the bill is, that he may take it up; and he is entitled to warning that the holder looks to him. Lord Eldon laid down the same rule in *Ex parte* Barclay.[3] The decisions in Hartley *v.* Case[4] and Solarte *v.* Palmer, which establish that information of the fact of dishonor must be given in the notice, show the importance of the rule that the party in whose hands the bill was when dishonored should be the party to give the notice. In Stewart *v.* Kennett, Lord Ellenborough ruled to that effect. His words are, "The notice must come from the person who can give the drawer or indorser his immediate remedy upon the bill; otherwise, it is merely an historical fact." It is true that in Rosher *v.* Kieran it was held that notice by the acceptor to the drawer is enough; and, in Jameson *v.* Swinton and Wilson *v.* Swabey,[5] it was ruled at Nisi Prius that notice by any party to a bill was sufficient; but it appears that no reference was made at the time of these decisions to the earlier authorities. In Gunson *v.* Metz,[6] the defendant was not proved to have had any notice except from a party not then holding, and he was considered nevertheless to be liable; but there the defect was supplied by proof of an agreement on the part of the defendant, which amounted to an admission of his liability, and was considered evidence of due notice having been given. If the notice here was good in favor of the plaintiff, Wiltshire, on the same principle, may avail himself of it, and sue upon the same bill. A party is not liable to be sued till he has had the opportunity of paying;

[1] Before Lord Denman, C. J., Littledale, Patteson, and Coleridge, JJ.
[2] 1 T. R. 167; 2 T. R. 186.
[3] 7 Ves. 597.
[4] 4 B. & C. 339.
[5] 1 Stark. N. P. C. 34.
[6] 1 B. & C. 193.

and, for this purpose, he ought to have notice from the party to whom he is to pay. It may be observed that in Jameson v. Swinton the defendant, as Lawrence, J., puts it, was enabled to take up the bill, if he pleased. So in Rosher v. Kieran the notice stated where the bill was.

Adolphus, contra. The decisions are certainly inconsistent; and it will be necessary for the court to elect between the two doctrines which have been laid down. Stewart v. Kennett, however, does not make against the plaintiff; for there the notice was given by a person not connected with any party to the bill; and all that is contended for by the present plaintiff is that a notice by any party to the bill is sufficient. And this is the principle laid down in Jameson v. Swinton and Wilson v. Swabey.[1] The object of the notice may be considered to be that the party receiving it may withdraw his effects from the hands of the party who has refused payment. In Chitty on Bills,[2] the doctrine that the notice imports that the holder intends to call upon the party receiving notice is mentioned; but the author afterwards says,[3] "However, according to the more recent decisions, it is not absolutely necessary that the notice should come from the person who holds the bill when it has been dishonored, and it suffices if it be given after the bill was dishonored, by any person who is a party to the bill, or who would, on the same being returned to him, and after paying it, be entitled to require reimbursement; and such notice will, in general, enure to the benefit of all the antecedent parties, and render a further notice from any of those parties unnecessary, because it makes no difference who gives the information, since the object of the notice is that the parties may have recourse to the acceptor;" and Shaw v. Croft is cited from a MS. note. [LORD DENMAN, C. J. Mr. Justice Bayley says[4] that it is "prudent in each party who receives a notice to give immediate notice to those parties against whom he may have right to claim; for the holder may have omitted notice to some of them."]

Cur. adv. vult.

LORD DENMAN, C. J., now delivered the judgment of the court.

On the trial of this action by the indorsee against the drawer of a bill of exchange, the Lord Chief Justice of the Common Pleas directed a nonsuit, for want of due notice of dishonor. The bill had been indorsed by the plaintiff, by the desire of Wiltshire, who had discounted it, and left it in the hands of the plaintiff's clerk, with instructions to obtain payment or give notice of dishonor. He did give notice to

[1] 1 Stark. N. P. C. 34.
[2] Page 526 (8th ed. 1833).
[3] Page 527.
[4] Bayley on Bills, c. vii. § 2, p. 255 (5th ed. 1830).

the defendant, but in the name of the plaintiff, not in that of Wiltshire, the then holder, who had deposited the bill with him.

The objection to the plaintiff's recovery was founded on the case of Tindal v. Brown,[1] in which all the judges of this court, except Lord Mansfield, considered a notice given by one who was not the holder as no notice, on the ground that the drawer was not thereby apprised of the holder's intention to look to him for payment; and this case was distinctly recognized, and its principle adopted, by Lord Eldon in *Ex parte* Barclay.[2]

Notwithstanding these high authorities, it is clear, from Jameson v. Swinton, Wilson v. Swabey,[3] and also from the learned treatises on Bills of Exchange, that the contrary doctrine has prevailed in the profession, and we must presume a contrary practice in the commercial world. It is universally considered that the party entitled as holder to sue upon the bill may avail himself of notice given in due time by any party to it. In the Nisi Prius cases just referred to, no express allusion was made to Tindal v. Brown [1] or *Ex parte* Barclay;[2] but we can hardly conceive that they were not present to the recollection of Lord Ellenborough and Mr. Justice Lawrence, or the counsel engaged. These learned judges, indeed, decided them at Nisi Prius, but without question. We are now compelled to determine whether the case of Tindal v. Brown,[1] as to this point, be good law. We think that it is not. If it were, the holder might secure his own right against his immediate indorser by regular notice; but the latter, and every other party to the bill, would be deprived of all remedy against anterior indorsers and the drawer, unless each of those parties should in succession take up the bill immediately on receiving notice of dishonor, a supposition which cannot be reasonably made. We may add that this point was not necessary for the decision of the case, as this court, including Lord Mansfield, granted a new trial on a different ground. *Rule absolute.*[4]

[1] 1 T. R. 167; 2 T. R. 186. [2] 7 Ves. 597.

[3] 1 Stark. N. P. C. 34.

[4] Lysaght v. Bryant, 9 C. B. 46; Rogerson v. Hare, 1 Jur. 71; Jennings v. Roberts, 4 E. & B. 615, *accord*.

In the last case, the party at the time of giving the notice of dishonor had no positive knowledge of the dishonor. But his ignorance was considered immaterial. — Ed.

SECTION II. —*Continued.*

Notice of Dishonor — (continued).

(e) To whom Notice should be given.

Ex parte MOLINE.

In Chancery, before Lord Eldon, C., August 11, 1812.

[*Reported in* 19 *Vesey*, 216.]

This petition, by assignees under a commission of bankruptcy, prayed that the proof of a debt may be expunged. One objection was that the creditor, being indorsee of a bill of exchange, forming one item of his proof against the bankrupt, as drawer, had by his conduct made the bill his own. The circumstances were, that the acceptor, when the bill was presented at eleven o'clock in the morning of the day it became due, refused payment; declaring, that it never would be paid. The holder immediately attended at the second public meeting under the commission on the same morning; and there before the choice of assignees gave notice to the bankrupt of that refusal.

Mr. *Richards*, in support of the petition, contended, first, that this refusal at that early period of the day, without any farther application, was not a sufficient ground for treating the bill as dishonored; and the notice on the same morning was therefore premature.

Secondly, that the notice was not given to the assiguees.

Sir Samuel Romilly, for the creditor, cited Burbridge *v.* Manners.

The Lord Chancellor Eldon. I do not recollect any decision, that, if an acceptor declares at eleven o'clock in the morning that he will not pay, notice of that to the drawer is not good. If the law does not impose on the holder the duty of inquiring again before five o'clock, it would be extraordinary that this information to the drawer of an answer, precluding any hope of obtaining any thing by calling again, should not have effect. If a banker says, he will not accept, I cannot imagine that the holder is obliged to apply again ten minutes before five.[1]

[1] Clowes *v.* Chaldecott, 7 L. J. K. B. 147; Bussard *v.* Levering, 6 Wheat. 102; Lindenberger *v.* Beall, 6 Wheat. 104; Curry *v.* Bank of Mobile, 8 Port. 360; McFarland *v.* Pico, 8 Cal. 626; Farmers' Bank *v.* Duvall, 7 Gill & J. 78; Widgery *v.* Monroe, 6 Mass. 449; Shed *v.* Brett, 1 Pick. 401; Gilbert *v.* Dennis, 8 Met. 495; Smith *v.* Little, 10 N. H. 526; Manchester Bank *v.* Fellows, 28 N. H. 302; Corp *v.* McComb, 1 Johns. Cas. 328; Etheridge *v.* Ladd, 44 Barb. 69; Lawson *v.* Farmers' Bank, 1 Oh

As to the other objection, the bankrupt represents his estate until assignees are chosen. All that was requisite, therefore, was done; and the notice is quite sufficient.[1]

St. 206; Coleman *v.* Carpenter, 9 Barr, 178; Haslett *v.* Ehrick, 1 N. & McC. 116 Thorpe *v.* Peck, 28 Vt. 127, *accord.*

Conf. Hartley *v.* Case, 1 C. & P. 555, 676. — Ed.

[1] *Ex parte* Chappel, 3 Mont. & Ayr. 490; *Ex parte* Johnson, 3 Dea. & C. 438; *Ex parte* Tremont Bank, 2 Lowell, 409, *accord.*

If notice is given after the appointment of the assignee it may be given either to the assignee or to the bankrupt, at the option of the party notifying. *In re* Bellman, 4 Ch. D. 795; *Ex parte* Russell, 16 N. B. R. 476 (*semble*).

Conf. Rohde *v.* Proctor, 4 B. & C. 517. — Ed.

In Armstrong *v.* Thruston, 11 Md. 148, it was held that presentment must be made to the maker, although bankrupt, and not to the assignee. — Ed.

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WILLIS v. GREEN.

IN THE SUPREME COURT, NEW YORK, MAY, 1843.

[*Reported in* 5 *Hill*, 232.]

ASSUMPSIT, tried at the Herkimer circuit, in September, 1834, before Denio, C. J. The action was by John R. Willis against Lester Green, on a promissory note in these words: —

"By the first of January next, I promise to pay John R. Willis, to the order of Smith Johnson and Lester Green, at the Bank of Utica in the village of Utica, four hundred and seventy-four dollars and ten cents, for value received.

"LITTLE FALLS, August 29th, 1827.

(Signed) "E. C. PINNEY.

(Indorsed) "SMITH JOHNSON. LESTER GREEN."

The declaration described the note as payable to the plaintiff, and averred, among other things, that it was indorsed to him by Johnson & Green, whereby they ordered the contents to be paid, &c.; concluding with the usual promise to pay. On the trial, the making and indorsement of the note were proved. It was also shown that the note was duly protested for non-payment on the 4th of January, 1828, and that on the same day notice of non-payment was sent by mail to each of the indorsers, directed to Little Falls. It further appeared that, when the note was given, Johnson resided in the town of Salisbury, Herkimer County, about eight miles from Little Falls, where he remained until the time of his death, which took place on the 27th of December, 1827, a few days before the note fell due. There was a post-office in Salisbury about one mile and a half from Johnson's residence. Green resided at Little Falls. Johnson died intestate and insolvent, and no letters of administration were granted till after the note fell due.

By consent of the counsel for both parties, the jury rendered a verdict in favor of the plaintiff for $700.78, subject to the opinion of this court on a case, with liberty to either party to turn the same into a bill of exceptions or special verdict.

C. P. Kirkland, for the plaintiff.

J. A. Spencer, for the defendant.

BY THE COURT, NELSON, C. J. It has already been decided in this case that the suit was properly brought in the name of the plaintiff, as Johnson and Green were the payees of the note, and the legal title

properly derivable through them by the indorsement. Willis v. Green.[1]

If notice of protest be material to charge Green as co-payee and indorser, it is equally important that it should be brought home to Johnson before either can be made liable. They were not partners, and therefore notice to one will not answer.[2] It was once supposed, in a like case, that the indorsers were partners *quoad* the particular transaction, Carvick v. Vickery; but that doctrine was repudiated when the case afterwards came on for trial before Lord Mansfield. It has ever since been the settled commercial rule that co-payees, not partners, must each indorse in order to negotiate the paper. Chitty on Bills, 66, 67, 254, ed. of 1840. It would seem consistently if not necessarily to follow from this doctrine that their interests, though joint as to the remedies against them on the paper, are so far distinct and separate as it respects each other that notice of the default of the maker should be given to both. In the ordinary case of a partnership, the interest is not only joint, but each member is a general agent of the concern; and hence notice to one is notice to all.[3] But here no such agency exists, as is sufficiently shown from the fact that each party must act for himself in the negotiation of the note.

I do not see but the case of joint indorsers, not partners, stands on the same footing as that of joint makers of a note who are not partners; and in respect to them it is settled that presentment must be made to each, in order to charge the indorser. The argument is about as strong both upon reason and analogy in favor of giving effect to a demand upon one of the co-makers, as it is in favor of giving effect to a notice to one of the co-indorsers. The question has been very fully and satisfactorily examined by the Supreme Court of Errors in Connect-

[1] 10 Wend. 516. Conf. Pike v. Galloway, 17 Ark. 91. — Ed.

[2] Shepard v. Hawley, 1 Conn. 367; State Bank v. Slaughter, 7 Blackf. 138; People's Bank v. Keech, 26 Md. 521; Dabney v. Stidger, 12 Miss. 749; Chenango Bank v. Root, 4 Cow. 126 (*semble*); Miser v. Trovinger, 7 Oh. St. 281; Sayre v. Frick, 7 W. & S. 383; Boyd v. Orton, 16 Wis. 495 (*semble*), *accord*.

Dodge v. Ky. Bank, 2 A. K. Marsh. 610; Higgins v. Morrison, 4 Dana, 100, *contra*. — Ed.

[3] Coster v. Thomason, 19 Ala. 717; Slocomb v. Lizardi, 21 La. An. 355; People's Bank v. Keech, 26 Md. 521; Dabney v. Stidger, 12 Miss. 749; Hubbard v. Matthews, 54 N. Y. 43, *accord*.

But conf. *In re* Carew, 31 Beav. 39; Hume v. Watt, 5 Kas. 34.

Notice to one of the executors of an indorser is sufficient. Lewis v. Bakewell, 6 La. An. 359; Beals v. Peck, 12 Barb. 245.

Notice to an agent of the drawer or indorser is of course sufficient. Wilkins v. Comm. Bank, 7 Miss. 217; Wilcox v. Routh, 17 Miss. 476; Fassin v. Hubbard, 55 N. Y. 471. See Valk v. Gaillard, 4 Strob. 99; La. Bank v. Ellery, 4 Mart. n. s. 87; Paine v. Edsell, 19 Pa. 178. — Ed.

icut, and a decision made in conformity with these views. Shepherd v. Hawley.[1]

The plaintiff failed to show that the estate of Johnson had been charged by notice of non-payment. If the notice relied on for that purpose had been sent to the proper place, no doubt it would have been sufficient, under the circumstances of this case, though directed to Johnson after his death. Stewart v. Eden,[2] the Merchants' Bank v. Birch. But the notice was sent to Little Falls instead of Salisbury where Johnson resided; and, if there were nothing else in the case, I think the failure to charge the estate by due notice would operate a discharge of both indorsers. It clearly would, if both were living, as a joint action could not in such case be sustained upon the note. And although the remedy at law survives against Green alone, yet, as he is entitled to contribution from the estate of his co-indorser, it seems to me equally obligatory upon the holder to prove that both were charged, or rather that the estate of the deceased was charged, so as to secure the remedy over. Otherwise, the whole debt would fall upon the survivor. The question, however, is not without its difficulties, and it is unnecessary now to decide it.[3]

THE PRESIDENT, DIRECTORS, & CO. OF THE MERCHANTS' BANK v. BIRCH AND DE WITT, EXECUTORS OF BIRCH.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, AUGUST, 1819.

[*Reported in* 17 *Johnson*, 25.]

THIS was an action of assumpsit brought by the plaintiffs, as indorsees of a promissory note, against the defendants, as executors of the indorser; and was tried the 4th of December, 1818, at the New York sittings, before the late Chief Justice.

The Chief Justice being of opinion that the plaintiffs had given sufficient notice of the non-payment, the jury, under his direction, found a verdict for the plaintiffs for 1,590 dollars and 29 cents.

A motion was made to set aside the verdict, and for a new trial,

[1] 1 Conn. 367. [2] 2 Caines, 121.

[3] The court gave judgment for the plaintiff, on the ground of an admission by the defendant that due diligence had been used. So much of the case as relates to this point has been omitted. — ED.

which was submitted to the court, on the above case,[1] without argument.

SPENCER, C. J., delivered the opinion of the court. The only question in this case is whether due notice was given of the non-payment of the note by the maker, so as to charge the defendants, who are the executors of the indorser.

It is not denied that the plaintiffs, the holders of the note, gave all the notice in their power to give, when the note fell due: notice was left at the last residence of the indorser, another notice was left with his reported agent, and another was sent to the residence of his family in the country, through the post-office. But it is insisted that the indorser being in fact dead when the note fell due, although the fact was unknown until some months afterwards, notice should have been given to his executors. It appears that the note became due on the 22d of December, 1815; that Birch sailed from New York on the 17th of November, 1815, on a voyage to Teneriffe, and died at sea on the 12th of December following; that his will was proved, and letters testamentary granted thereon on the 22d of April, 1816; and that his death was not known at New York until the last of March, 1816. No notice was given to the executors of the non-payment of the note.

The case of Stewart v. the Executors of Eden[2] governs and decides this case. In that case, the note fell due on the 8th of November, 1798; the indorser, Medcef Eden, died on the 13th of September, 1798; and it was held by the court that notice directed to the indorser himself, and left at his dwelling-house, which was shut up, was good notice. Mr. Justice Livingston, in delivering the opinion of the court, observed: "Nor was it fatal to direct the notice to the indorser himself, for as it was not known whether he had made a will, nor who his executors were, until long after, it was full as probable that it would reach the parties interested by this address, as by any other. Some one of the deceased's family would open it, or see it safely delivered to an executor: the notice, therefore, was well served, and its address proper."

If an indorser be dead at the maturity of a note, and there be executors or administrators at that time known to the holder, notice must be given to them, for they represent the testator or intestate, and are as fully entitled to notice as he would be, if alive. But it is a novel principle, unsupported either by precedent or authority, that notice is to be given to the representatives of the indorser, and who

[1] The statement of the case, being substantially reproduced in the judgment of the court, has been omitted. — ED.

[2] 2 Caines, 121.

become such long after the note has fallen due. The rights of the holder of a note or bill are to be determined by his acts, when the note or bill becomes due; and, if he then gives such notice as under the existing state of facts the law requires of him, his rights are fixed, and he cannot be required to superadd any other notice at a future period. In the case cited, no notice had been given to the executors; and we perceive that the notice delivered at the dwelling-house of the deceased indorser was pronounced to be well delivered.

We have not been furnished with the pleadings, and therefore cannot notice any suggestions that the proof did not correspond with the averments in the declaration: nothing is referred to us but the single point whether due notice was given to the indorser.

Judgment for the plaintiffs.[1]

MASSACHUSETTS BANK *v.* SARAH H. OLIVER, EXECUTRIX.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER TERM, 1852.

[*Reported in* 10 *Cushing*, 557.]

ASSUMPSIT against the indorser of a promissory note, dated April 27, 1847, for $839.45, payable in six months after date, to the order of Henry J. Oliver, the defendant's testator.

The only defence was the want of proper notice to the indorser of non-payment by the maker. Henry J. Oliver, the indorser, died September 5, 1847, fifty-four days before the maturity of the note; and the defendant was qualified as executrix by the judge of probate, October 23, 1847, and notice of said appointment was duly published by the defendant in the "Boston Daily Advertiser," October 26, November 2 and 9, 1847. The plaintiff bank was situated in Boston, and the "Advertiser" was at the time regularly taken at the bank.[2]

[1] Weaver *v.* Penn, 27 La. An. 129; Matthewson *v.* Strafford Bank, 45 N. H. 104; Stewart *v.* Eden, 2 Cai. 121, *accord*. See also Boyd *v.* City Savings Bank, 15 Grat. 501 (*semble*); Boyd *v.* Orton, 16 Wis. 495.

If the death of an indorser is unknown to the holder, a notice addressed to him as if he were still living is valid. Maspero *v.* Pedesclaux, 22 La. An. 227; Barnes *v.* Reynolds, 5 Miss. 114; Linderman *v.* Guldin, 34 Pa. 54; Beals *v.* Peck, 12 Barb. 245 (*semble*); Planters' Bank *v.* White, 2 Humph. 112. — ED.

[2] The rest of the statement of the case, being substantially reproduced in the opinion of the court, has been omitted, as well as the argument of counsel for the plaintiffs. — ED.

W. Sohier, for the plaintiffs.

W. R. P. Washburn, for the defendant.

METCALF, J. When the indorser of a note dies before its maturity, it is necessary, in order to charge his estate, that notice of nonpayment should be given to his executor or administrator, if there be any known to the holder, or who might be known to him, on his using due diligence to ascertain. Oriental Bank *v.* Blake,[1] Merchants' Bank *v.* Birch, Cayuga County Bank *v.* Bennett.[2] And, when the holder and the executor or administrator live in different towns, a notice, properly directed to the latter and put into the post-office is sufficient. Shed *v.* Brett.[3]

The notice, in this case, was directed "to the estate of Henry J. Oliver, deceased," and was put into the post-office at Boston. It is insisted for the plaintiffs that this was sufficient. And their counsel has cited a decision of the Supreme Court of Tennessee, Pillow *v.* Hardeman,[4] that notice directed "to the legal representative" of a deceased indorser is a good notice. The ground of that decision was that the words "legal representative," in their ordinary sense, are synonymous with executor or administrator. *A fortiori*, notice directed "to the executor or administrator," without naming him, would have been held sufficient. But either of such notices would be directed to an existing person, though not by name, yet by clear description; and that person would know that it was addressed to him, as well as he would know it if his name were used. In the present case, the notice was directed, not to any person either by name or description, but "to the estate" of the defendant's testator. This direction was quite as applicable to the testator's heirs-at-law as to his executrix; and there is no reason why she, rather than they, should take it from the post-office, or be presumed to have received it.

Whether this notice would be held sufficient, if it had appeared that the defendant received it, we need not inquire. For the statement of the postmaster at Roxbury does not warrant us to infer, with any confidence, that she did receive it, and thereupon to charge her with actual notice.

But, as the law does not require that the holder of an indorsed note should have knowledge beyond his means of obtaining it, he is excused from giving notice to the executor or administrator of the indorser, when he neither knows, nor can by reasonable diligence know, whether there is one, or who he is, or where he resides. The use of due diligence to ascertain is all that is required. Was such diligence used in this case? We are all of opinion that it was not. The indorser died more than seven weeks before the note was payable.

[1] 22 Pick. 206. [2] 5 Hill, 236. [3] 1 Pick. 401. [4] 3 Humph. 588.

The president of the bank had information, a week at least before the note was payable, that the defendant was the executrix named in the indorser's will. The plaintiffs took the newspaper in which the defendant had given notice, three days before the note fell due, that she had been appointed executrix of the will, and had taken upon herself that trust. And though it is agreed by the parties that the president of the bank had no knowledge, before the day when the note was payable, of the defendant's appointment as executrix, by the judge of probate; and though we were to assume (without proof) that no other of the officers of the bank, before that day, saw the defendant's notice in the newspaper, nor actually knew who the executrix was, yet the facts, which the p rties have agreed on, show that certain knowledge might have been obtained in a very few minutes, if any proper inquiry had been made by any of those officers or by the notary into whose hands the note was put for protest and notice.

Judgment for the defendant.[1]

[1] In Barnes *v.* Reynolds, 5 Miss. 114; Pillow *v.* Hardeman, 8 Humph. 538, due diligence was used.

In Oriental Bank *v.* Blake, 22 Pick. 206; Goodnow *v.* Warren, 122 Mass. 79; Smalley *v.* Wright, 40 N. J. 471; Cayuga Bank *v.* Bennett, 5 Hill, 236, due diligence was not used.

If the deceased left a will, and it is necessary to serve notice before the person named as executor has either been qualified by the probate court, or renounced his trust, notice may be sent either to the executor so named, or to the last residence or place of business of the deceased. Goodnow *v.* Warren, 122 Mass. 79; Schoenberger *v.* Lancaster Institution, 28 Pa. 459.

But notice sent to one who is subsequently appointed administrator is a nullity. Goodnow *v.* Warren, 122 Mas. 82 (*semble*); Matthewson *v.* Strafford Bank, 45 N. H. 104. — Ed.

SECTION II. — *Continued.*

Notice of Dishonor — (continued).

(*f*) Mode of giving Notice.

SCOTT *v.* LIFFORD.[1]

In the King's Bench, May 6, 1808.

[*Reported in* 9 *East*, 347.[2]]

This was an action by the indorsee of a bill of exchange against the drawer. It appeared that the bill had been drawn on the 1st of March, 1806, by the defendant on one Moses Agar, payable three months after date; and the plaintiff, having become the holder of it, had placed it in the hands of his bankers, Down & Co. On the 4th of June, when the bill became due, a clerk of Down & Co. presented it for payment, and it was dishonored. On the 5th, they returned it to the plaintiff, who, by letter put into the twopenny post on the 6th, gave notice to the defendant of the dishonor; the plaintiff living in London, and the defendant at Shadwell. The case was left to the jury on the question whether the notice of the dishonor had been given in reasonable time; and the jury, being of opinion that it had, found a verdict for the plaintiff. And, on motion by *Wigley* for a new trial on the ground that due diligence had not been used,

Lord Ellenborough, C. J., said: I cannot say that the holder on the return of the bill dishonored to him is bound, *omissis omnibus aliis negotiis*, to post off immediately with notice: if reasonable diligence has been used, it is sufficient.

Grose, J. Whether due diligence has been used is a question of law; but judges may take the opinion of a jury as to what is convenient in the manner of giving notice.

Le Blanc, J. It cannot be contended that a banker ought to give notice of the dishonor to any but his customer for whom he held the bill; and I cannot rule that the holder of a bill may not avail himself of the conveyance by the twopenny post.[3] *Rule refused.*

[1] *Ex relatione* Magi Selwyn.

[2] 1 Camp. 246, s. c. — Ed.

[3] Smith *v.* Mullett, *supra*, p. 380, and cases cited *supra*, p. 381, note 1 (*semble*); Curtis *v.* State Bank, 6 Blackf. 312 (*semble*); Walters *v.* Brown, 15 Md. 285; Peirce *v.* Pendar, 5 Met. 352, 356 (*semble*); Gist *v.* Lybrand, 3 Oh. 307; Shoemaker *v.* Mechanics' Bank, 59 Pa 79, *accord*.

Ireland *v.* Kip, 11 Johns. 231, *contra*. — Ed.

HOUSEGO *v.* COWNE.

In the Exchequer, Hilary Term, 1837.

[*Reported in* 2 *Meeson & Welsby*, 348.]

Assumpsit by the indorsee against the drawer of a bill of exchange. Plea, no notice of dishonor, and issue thereon.

At the trial before the under-sheriff of Middlesex, a witness was called for the plaintiff, who proved that he took the bill to the defendant's house, where he saw his wife, and told her that he had brought back the bill which had been dishonored. She said she did not know any thing about it, but that she would tell her husband of it when he came home. The witness then came away without leaving any written notice of dishonor. The under-sheriff having held this to be sufficient proof of notice,

Humphrey now moved for a new trial, on the ground that the proof was insufficient. He cited Solarte *v.* Palmer and Hartley *v.* Case.[1] [Parke, B. This is a very different case from Solarte *v.* Palmer. In Woodthorpe *v.* Lawes, this court held a notice of dishonor to be sufficient, though it did not state on whose behalf payment was applied for or where the bill was lying.] As the defendant was not himself seen, a written notice ought to have been left: the verbal message might be misrepresented. [Lord Abinger, C. B. The wife would be as likely to deliver a verbal notice as a written one. Parke, B. The sending a verbal notice to a merchant's country house during the hours of business is sufficient, though no one is there.] It is assumed in that case that the merchant undertakes to have some one there during those hours. [Bolland, B. So a person not a merchant, who draws a bill of exchange, undertakes to have some one at his house to answer any application that may be made respecting it when it may become due.] *Per Curiam. Rule refused.*[2]

[1] 2 B. & Cr. 339.

[2] A verbal notice is sufficient. Tindal *v.* Brown, 1 T. R. 167; Metcalfe *v.* Richardson, 11 C. B. 1011; Houlditch *v.* Cauty, 4 B. N. C. 411; Phillips *v.* Gould, 8 C. & P. 355; Chard *v.* Fox, 14 Q. B. 200; Viale *v.* Michael, 30 L. T. Rep. 463; Thompson *v.* Williams, 14 Cal. 160; Merritt *v.* Woodbury, 14 Iowa, 299; First Nat. Bank *v.* Ryerson, 23 Iowa, 508; Bank *v.* Brooking, 2 Litt. 41; Gilbert *v.* Dennis, 3 Met. 495; Glasgow *v.* Pratte, 8 Mo. 336; Cuyler *v.* Stevens, 4 Wend. 566. — Ed.

THE BANK OF COLUMBIA, USE OF THE BANK OF THE UNITED STATES, v. JOHN LAWRENCE.

IN THE SUPREME COURT, UNITED STATES, JANUARY TERM, 1828.

[*Reported in* 7 *Curtis*, 707; 1 *Peters*, 578.]

THE case is stated in the opinion of the court.

Key and *Dunlop*, for the plaintiffs.

Jones and *Taylor*, contra.

THOMPSON, J., delivered the opinion of the court.

This case comes before the court upon a writ of error to the Circuit Court of the District of Columbia.

The defendant was sued as indorser of a promissory note for $5,000, made by Joseph Mulligan, bearing date the 15th of July, 1819, and payable sixty days after date at the Bank of Columbia. The making and indorsing the note, and the demand of payment, were duly proved; and the only question upon the trial was touching the manner in which notice of non-payment was given to the indorser, no objection being made to the sufficiency of the notice in point of time.

The material facts before the court upon this part of the case, as shown by the bill of exceptions, were: that the banking-house of the plaintiffs was in Georgetown, at which place the note appears to be dated; that some time before the note fell due the defendant had lived in the city of Washington, and carried on the business of a morocco leather-dresser, keeping a shop and living in a house of his own in the said city; that, about the year 1818, he sold his shop and stock in trade and relinquished his business, and removed with his family to a farm in Alexandria County, within the District of Columbia, and about two or three miles from Georgetown. That the Georgetown post-office was the nearest post-office to his place of residence and the one at which he usually received his letters.

The notice of non-payment was put into the post-office at Georgetown, addressed to the defendant at that place.[1]

The jury found a verdict for the defendant.

From this statement of the case, it appears that the note was made at Georgetown, payable at the Bank of Columbia in that town; that the defendant when he indorsed the note lived in the county of Alexandria within the District of Columbia, and having what is alleged to have been a place of business in the city of Washington; and the notice of non-payment was put into the Georgetown post-office,

[1] The learned judge's statement of the facts has been somewhat abbreviated. — ED

addressed to the defendant at that place, by which it is understood that the notice was either enclosed in a letter, or the notice itself sealed and superscribed with the name of the defendant, with the direction "Georgetown" upon it; and whether this notice is sufficient is the question to be decided.

If it should be admitted that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good, it by no means follows that service at his place of residence in a different place would not be equally good. Parties may be and frequently are so situated that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such; no open or public business of any kind carried on, but merely occasional employment there two or three times a week in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case, the inquiry is narrowed down to the single point, whether notice through the post-office at Georgetown was good; the defendant residing in the country two or three miles distant from that place in the county of Alexandria.

The general rule is, that the party whose duty it is to give notice in such cases is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary mode of conveyance, and, whether the notice reaches the party or not, the holder has done all that the law requires of him.

It seems at this day to be well settled that, when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed or uniform rules on the subject, and is highly important for the safety of holders of commercial paper.

And these rules ought to be reasonable and founded in general convenience, and with a view to clog as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject have had in view these objects. Thus, when a party entitled to notice has in the same city or town a dwelling-house and counting-house or place of business within the compact part of such city or town, a notice delivered at either place is sufficient; and, if his dwelling and place of business be within the district of a letter-carrier, a letter containing such notice, addressed to the party and left at the post-office, would also be sufficient. All these are usual and ordinary modes of com-

munication, and such as afford reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay. So, when the holder and indorser live in different post-towns, notice sent by the mail is sufficient, whether it reaches the indorser or not. And this for the same reason, that the mail being a usual channel of communication, notice sent by it is evidence of due diligence. And, for the sake of general convenience, it has been found necessary to enlarge this rule. And it is accordingly held that, when the party to be affected by the notice resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office within which the party must reside, in order to make this a good service of the notice. Nor would we be understood as laying it down as a universal rule that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence.

In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone or the usual course of receiving letters which must determine the sufficiency of the notice. The residence of the defendant, therefore, being in the county of Alexandria, cannot affect the question. It was in proof that the post-office in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And as the letter was there to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one.

No cases have fallen under the notice of the court which have suggested any limits to the distance from the post-office within which a party must reside, in order to make the service of the notice in this manner good. Cases, however, have occurred, where the distance was much greater than in the one now before the court, and the notice held sufficient. 16 Johns. 218. In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient,

a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say no such cases can arise, but they will seldom if ever occur, and at all events such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the indorser the expenses of serving notice by a special messenger. The case of Pearson *v.* Crallan [1] is one of this description. But, in that case, the court did not say that it was necessary to send a special messenger; and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He may employ a special messenger if he pleases,[2] but no case has been found where the English courts have directly decided that he must. To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper on the party bound to pay is at least very questionable.

We are accordingly of opinion that the notice of non-payment was duly served upon the defendant, and that the court erred in refusing so to instruct the jury.

Judgment reversed, and a venire facias de novo awarded.[3]

[1] 2 Smith, 404; Chitty, 222, n.

[2] Bancroft *v.* Hall, Holt, N. P. 476; Darbishire *v.* Parker, 6 East, 3 (*semble*); Pearson *v.* Crallan, 2 Smith, 404; Bartlett *v.* Hawley, 120 Mass. 92, *accord.* — Ed.

[3] Carson *v.* Ala. Bank, 4 Ala. 148; Walker *v.* Augusta Bank, 8 Ga. 486; Timms *v.* Delisle, 5 Blackf. 447; Bell *v.* State Bank, 7 Blackf. 456; Bondurant *v.* Everett, 1 Met. (Ky.) 658 (overruling Logan Bank *v.* Butler, 8 Litt. 498); Lathrop *v.* DeLee, 8 La. An. 170, 171; N. O. Bank Co. *v.* Barrow, 2 La. An. 326 (overruling McCrummen *v.* McCrummen, 5 Mart. N. S. 158; La. Bank *v.* Rowel, 6 Mart. N. S. 506); U. S. Bank *v.* Norwood, 1 Har. & J. 423; Nevins *v.* Lansingburgh Bank, 10 Mich. 547 (*semble*) (overruling Newberry *v.* Trowbridge, 4 Mich. 391); Barrett *v.* Evans, 28 Mo. 331; Sanderson *v.* Reinstadler, 31 Mo. 483; Mo. Bank *v.* Vaughan, 36 Mo. 90; Jones *v.* Lewis, 8 W. & S. 14; Foster *v.* Sineath, 2 Rich. 338, *accord.*

Patrick *v.* Beazley, 7 Miss. 609; Barker *v.* Hall, Mart. & Yerg. 183; Davis *v.* Tenn. Bank, 4 Sneed, 390 (*semble*), *contra.*

See Clay *v.* Oakley, 5 Mart. N. S. 137. — Ed.

The object of the rule in this case being to relieve the holder from the burden of sending a special messenger, service by mere deposit in the post-office of the town of the party notifying is insufficient, even though the party to be charged is in the habit of receiving his letters there, if there is in his own town a post-office where he also receives his letters. Shelburne Bank *v.* Townsley, 102 Mass. 177.

A holder ignorant of the address of the party to be notified may forward it to a person who will probably know it, and the latter may address and simply *deposit* it in the post-office, although the party to be notified lives in the same town with the party so depositing it. Hartford Bank *v.* Stedman, 3 Conn. 489.

SHELDON, Executor, &c., of Babcock, v. BENHAM, impleaded, &c.

In the Supreme Court, New York, January, 1843.

[*Reported in* 4 *Hill*, 129.]

Assumpsit, tried at the Yates circuit in November, 1841, before Moseley, C. J. The action was against Benham and Charles Hubbard, as indorsers of the following note: —

"Three months after date, for value received, I promise to pay to the order of Charles Hubbard three hundred dollars at the Bank of Geneva.

"Penn Yan, April 1, 1837.

(Signed) "W. Staats.

(Indorsed)

"Ch's. Hubbard, George Benham, Moses Hubbard, Jr."

Notices for each of the indorsers in the name of Coffin, the notary, were sent by mail to Babcock, who lived at Penn Yan; and were postmarked Geneva, July 5th. The defendant Benham resided at Penn Yan; and on the 6th of July, 1837, Babcock put the notice for Benham, which had been forwarded from Geneva, in the post-office at Penn Yan, directed to Benham. The defendant Benham moved for a nonsuit, on the grounds that leaving the notice in the post-office at Penn Yan, there being no evidence that the defendant received it, was insufficient. The motion for a nonsuit was overruled. Further testimony was given, and some other questions raised, after which the cause was submitted to the jury, who found a verdict for the plaintiff. The defendant now moved for a new trial on a case.[1]

H. Wells, for the defendant.

A. Gardiner, for the plaintiff.

By the Court, Bronson, J. It seems to have been assumed on the trial that Babcock owned the note, and sent it to the bank, where it was made payable for collection. Notice was sent to Babcock, the last indorser, with notices for the other indorsers; and, if he was not mistaken as to the proper mode of service, he gave notice to the defendant Benham on the same day or the day after he received advices from the bank. Either day was sufficient. Howard v. Ives, Bank of the United States v. Davis.[2] But as Babcock and the

[1] Only so much of the case is given as relates to the question of notice. — Ed.

[2] 2 Hill, 451.

defendant Benham both lived in the same village, I think the service should have been personal, or by leaving the notice at the dwelling-house or place of business of the indorser, and that service through the post-office was not sufficient. The post-office is not a place of deposit for notices to indorsers, except where the notice is to be transmitted by mail to another office. Ransom *v.* Mack.[1] None of our cases have gone further than that. *New trial granted.*[2]

T-45-0

VAN VECHTEN AND OTHERS *v.* PRUYN.

IN THE COURT OF APPEALS, NEW YORK, MARCH, 1856.

[*Reported in* 13 *New York Reports*, 549.]

APPEAL from a judgment of the Supreme Court, upon a case made by the parties, and submitted to the court pursuant to § 372 of the Code of Procedure. The judgment was rendered at a general term in the third district, in favor of the defendant. The plaintiffs appealed to this court.

The sole question was whether the defendant was duly charged as the indorser of three promissory notes made by one J. V., payable at the Catskill Bank to the order of and indorsed by the defendant. The notes were respectively discounted by the Catskill Bank, and each at

[1] 2 Hill, 587.

[2] Bowling *v.* Harrison, 6 How. 248; Williams *v.* U. S. Bank, 2 Pet. 96, 101; Spalding *v.* Krutz, 1 Dill. C. C. 414; Stephens *v.* Primrose, 8 Port. 155; Foster *v.* McDonald, 3 Ala. 34; Tyson *v.* Oliver, 43 Ala. 455; Vane *v.* Collins, 6 Cal. 435; Brindley *v.* Barr, 8 Harring. 419; Curtis *v.* State Bank, 6 Blackf. 312; Laporte *v.* Landry, 17 Mart. 359; Green *v.* Darling, 15 Me. 141; David *v.* Gowen, 19 Me. 447; Peirce *v.* Pendar, 5 Met. 352; Phips *v.* Chase, 6 Met. 492; Phips *v.* Milbury Bank, 8 Met. 79; Wilson *v.* McNutt, 3 Miss. 776; Patrick *v.* Beazley, 7 Miss. 609; Bowling *v.* Arthur, 34 Miss. 41; Gilchrist *v.* Donnell, 53 Mo. 591; Ireland *v.* Kip, 10 Johns. 490; 11 Johns. 231, s. c.; Smedes *v.* Utica Bank, 20 Johns. 372, *accord.*

Conf. Bartlett *v.* Robinson, 39 N. Y. 187 (statutory).

But the post-office may be used as a place of deposit, if the indorser has so directed in his indorsement. Baker *v.* Norris, 25 Barb. 188.

So also if the notice is, in fact, received in due time. Hyslop *v.* Jones, 3 McL. 96; Hill *v.* Norvell, 3 McL. 583; Foster *v.* McDonald, 5 Ala. 376; Grinman *v.* Walker, 9 Iowa, 426; Cabot Bank *v.* Warner, 10 All. 522 (*semble*).

In Alabama, an agent may use the post-office as a place of deposit for the purpose of sending notice, if the actual owner of the bill resides in a different place Gindrat *v.* Mechanics' Bank, 7 Ala. 824; Bibb *v.* McQueen, 42 Ala. 408; Philipe *v.* Harberlee, 45 Ala. 597.

So also, if at the time of the dishonor of the bill the indorser is dead and no personal representative has been appointed, the post-office may be used as a place of deposit for a notice addressed to the "legal representatives" of the deceased. Boyd *v.* City Savings Bank, 15 Grat. 501; Boyd *v.* Orton, 16 Wis. 495. — ED.

maturity was duly presented at that bank for payment, which was refused; and notice, in proper form, of the dishonor of each was, on the day when it matured, deposited by the notary who presented the same for payment in the post-office in the village of Catskill, addressed to the defendant at the city of New York. The bank was located and the notary resided in the village of Catskill. Prior to and when the notes were made, and at and after the time they matured, and when the notices of dishonor were served as aforesaid, the defendant and his family resided in the village of Catskill, within two hundred yards of the bank; and such residence was known to the officers of the bank and the notary. Prior to the date of the notes, the defendant and the maker formed a copartnership, and thence, until after they matured, carried on business as attorneys and counsellors under a firm name in the city of New York, occupying an office at 89 Wall Street. During this period, the defendant had no other place of professional or other general business than the office in New York. The firm had a letter-box at the New York post-office, at which their business letters, and also letters addressed to the members of the firm individually, were received; but the defendant had no separate letter-box in that post-office. The case stated that the defendant did not admit that all letters addressed to him at New York were received by him; and it did not appear whether the notices as to the notes in suit, addressed to him there, were ever received or not. The defendant was accustomed during this period to receive letters and papers at the post-office in Catskill, where he kept a postage account and letter-box. The defendant was usually at his office in New York from Monday evening to Friday evening of each week, and the residue of the time he spent with his family at Catskill. The notes were owned by the Catskill Bank when they matured, and the plaintiffs had succeeded to the rights of the bank as to the same: there was nothing on the notes indicating where notice of dishonor should be sent.

L. Tremain, for the appellant.

J. H. Reynolds, for the respondent.

COMSTOCK, J. The precise question in this case is whether the indorser of a note, whose known residence is in the same village where the note is held and protested, and who is at home three days in the week, can be charged by a notice of protest directed to him by mail in a distant town or city where his place of business is, where he spends the residue of his time and receives letters and papers, there being no evidence that the notice actually reached him in due time so as to render it equivalent to personal service. I can find no authority for charging him by such a notice, and I think no principle can be urged in favor of the proposition.

It is well settled that, when the indorser resides at the place of the presentment and dishonor of the note, the notice must be served on him personally, or, what is deemed equivalent, must be left at his dwelling or place of business, if he has one there. Ireland *v.* Kip,[1] Ransom *v.* Mack,[2] Sheldon *v.* Benham, Smedes *v.* Bank of Utica.[3] This is the language of all the authorities; and it is pertinent to add in this connection that originally service through the post was not allowed in any case, wherever the indorser might reside. Ransom *v.* Mack, *supra*. The rule was relaxed when the person to be notified resided in a different place from the one where the note was presented. In such cases, it was allowed to send by the post, and so the law is now well settled. This modification of the old rule has also been held to embrace the case where the indorser resides in a distant part of the same town nearer to another post-office at which he usually receives his letters, and there is a regular mail communication between the two places; the test being whether there is a regular communication by mail from the one place to the other. Ransom *v.* Mack.[2]

Further than this, I do not find that the rule requiring personal service has ever been relaxed, and I see no reason why it should be further relaxed. The service which the rule requires is of a higher and safer degree than service by mail. Service in the latter mode when allowed is complete by a mere deposit of the notice in the post-office in proper time and properly directed, whether it ever reaches the indorser or not. All that the law requires of the holder is due diligence in mailing the notice, and he is not responsible for any accidents which may prevent its due transmission and delivery. Hence the inferiority of this mode of service. It is less safe by just so many degrees as the mere probability of transmission by mail and delivery from the post-office is below the certainty of a personal notification. And this is the reason of the rule which has been stated. A relaxation is admitted to avoid the inconvenience of making a journey or sending a messenger to another place more or less remote. In the present case, the indorser was known to reside within two hundred yards of the bank where the note was protested; and as service clearly might have been made on him there, and without the inconvenience suggested, I think the rule requires that it should be so made.

It is urged on behalf of the plaintiffs that notice may be served either at the residence[4] of the party to be charged or at his place of

[1] 10 Johns. 490. [2] 2 Hill, 587. [3] 20 Johns. 372.

[4] Stedman *v.* Gooch, 1 Esp. 3; U. S. Bank *v.* Hatch, 6 Pet. 250; Exch. Co. *v.* Boyce, 8 Rob. (La.) 307; Stewart *v.* Eden, 2 Cai. 121; Moodie *v.* Morrall, 1 Mill, C. R. 367; Adams *v.* Wright, 14 Wis. 408 (*semble*), *accord*.

Conf. Ashley *v.* Gunton, 15 Ark. 415. — ED.

business, and cases are cited to the proposition. There is an obscurity in the proposition as stated when the service is by mail, and it is of that we are speaking: it is not made either at the residence or place of business, but it is made, as we have already seen, at the place of the presentment and dishonor of the note, by depositing the notice in the post-office properly directed. More accurately stated, however, the proposition is true and is fully sustained by the authorities, but it does not help the present case. When the service is not by mail, the notice may be left indifferently at the indorser's dwelling or place of business; and within this principle I presume the notice would have been sufficient, if actually left at the defendant's place of business in New York. So, when the service is by mail, the law is indifferent whether the notice is directed to the indorser's residence or to the place of his business where he receives letters. Montgomery County Bank *v.* Marsh,[1] Downer *v.* Remer,[2] Reid *v.* Payne,[3] Bank of Geneva *v.* Howlett.[4] But this is as far as the cases go. The law is not indifferent as to the mode of service. It does not say that the holder may elect between personal and mail service, because there happens to be a place of business to which the mail goes, so long as there is also a place of residence at which service cannot be made through the post-office, but must be made personally.

The case of the Seneca County Bank *v.* Neass[5] has been cited, but it does not reach the question. There the indorser received his letters at the post-office in the village where the note was protested; but he resided in another town, in which were two offices, and it did not appear that the holder knew any thing of him except his residence in that town. It was held that notice sent by mail to those offices was a good service. That case was put in this court very much upon the Act of 1835 (Stat. p. 152), which provides that, in all cases where notice may be served by mail, it shall be sufficient to direct it to the residence of the indorser, unless he has himself specified some other post-office to which it is to be addressed. The law was substantially the same before the Act of 1835. That statute was passed to obviate the inconvenience arising from an erroneous decision, Cuyler *v.* Nellis,[6] which was afterwards overruled in the Court of Errors, Downer *v.* Remer.[2] The case last mentioned, as well as that of the Seneca County Bank *v.* Neass, go upon this doctrine, clothed with statutory authority by the Act of 1835, that, where the holder knows the indorser's residence, he may send the notice to that address, and is not put upon inquiry whether there is a nearer or some other post-office at which the indorser receives his letters. But neither of these cases

[1] 8 Seld. 481. [2] 23 Wend. 620. [3] 16 Johns. 218.
[4] 4 Wend. 328. [5] 3 Comst. 442. [6] 23 Wend. 620.

is any authority for sending a notice by mail away from the indorser's known residence to his place of business elsewhere, or for serving by mail at all when he resides at the very place where the note is protested.

The judgment should be affirmed.

MITCHELL, J., delivered an opinion in favor of reversing the judgment of the Supreme Court and ordering judgment in favor of the plaintiffs for the amount of the notes.

All the other judges were in favor of affirmance.[1]

Judgment affirmed.[2]

PLINY SHAYLOR v. SILAS MIX AND OTHERS.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1862.

[*Reported in* 4 *Allen*, 351.]

CONTRACT against the makers and indorser of a promissory note, payable at the Housatonic Bank in Stockbridge. The action was defended by the indorser, William B. Hall, alone.

At the trial in the Superior Court before Russell, J., it appeared that on the last day of grace, the note being unpaid, the cashier of the bank deposited in the post-office at Stockbridge a notice of the non-payment, addressed to the indorser at Curtisville, a distinct village within the town of Stockbridge, where the indorser lived, and where there was a post-office at which he usually received his letters, and that this notice was received by the indorser upon the following day. The judge ruled that upon these facts the plaintiff was entitled to recover, and a verdict was returned accordingly; and the defendant Hall alleged exceptions.

J. E. Field, for the defendant Hall.

J. Branning, for the plaintiff.

BIGELOW, C. J. The general rule, that notice of the dishonor of a bill or note may be sent by mail to a drawer or indorser who resides in a different city or town from that in which the holder resides, is founded on the universal usage of all persons engaged in commercial and other business transactions to resort to the public post as a safe

[1] The concurring opinion of Johnson, J., has been omitted. — ED.

[2] Conf. Hunt v. Watt, 5 Kan. 34; Miles v. Hall, 20 Miss. 382. — ED.

and certain medium of communication between places from and to which there is a regular transmission of the mail. Indeed, if such was not the rule, and it was necessary, in order to charge a drawer or indorser, either to give him personal notice of the dishonor of a bill or note, or to leave a notice at the place of his domicile, it is obvious that in many cases a very serious burden would be put on the holder of negotiable paper, and its free circulation beyond the limits of the domicile of the parties would become almost impracticable. The use of the mail is therefore sanctioned by law as a necessary, proper, and reasonable mode of giving notice, in all cases where the holder and the drawer or indorser of bills of exchange or promissory notes reside in different places.[1]

The same reasons exist for holding a notice by mail sufficient, where the drawer or indorser and the person who is to give the notice reside in the same town, municipality, or district, but in distinct and separate villages, parishes, or settlements, at a distance of several miles from each other, between which there is a regular intercourse by mail, and where it is shown that the party to whom the notice is addressed is in the habit of receiving letters sent to him in the course of his business at the post-office of the village in or near which he resides. On the question of notice, the fact that the parties both live within the territorial limits of a large town and under the same municipal government may be quite immaterial. The real inquiry is, whether there are real communications by mail from the place where the notice is deposited to that where the drawer or indorser resides, and a separate post-office in the latter place to which he is in the habit of resorting to receive letters which are forwarded to him there by mail. If so, then a notice seasonably deposited in the mail may well be deemed a reasonable and sufficient notice of the dishonor of a bill or note.[2]

In the present case, it appears not only that notice of the non-payment of the note by the promisor was placed in the post-office on the day the note fell due, but it is also admitted that this notice was duly

[1] Bussard v. Levering, 6 Wheat. 102; Lindenberger v. Beall, 6 Wheat. 104; Greene v. Farley, 20 Ala. 822; Shepard v. Hall, 1 Conn. 329; Munn v. Baldwin, 8 Mass. 316; State Bank v. Ayers, 2 Halst. 130; Foster v. Sineath, 2 Rich. 338, *accord*.

Farmers' Bank v. Butler, 3 Litt. 498; Fish v. Jackman, 19 Me. 467; Nashville Bank v. Bennett, 1 Yerg. 166, *contra*.

Conf. Stix v. Mathews, 63 Mo. 371.

If the ordinary mail service is suspended or broken up, the holder must employ other modes of communicating notice, if possible. Citizens' Bank v. Pugh, 19 La. An. 48; Lapeyre v. Robertson, 20 La. An. 399. — Ed.

[2] Chicopee Bank v. Eager, 9 Met. 583 (usage); Cabot Bank v. Russell, 4 Gray, '67 (*semble*); Ransom v. Mack, 2 Hill, 587; Paton v. Lent, 4 Duer, 231, *accord*. — Ed

received by the defendant in the usual course of the mail. We cannot doubt that such a notice was in all respects sufficient to charge the defendant on his indorsement. Cabot Bank *v.* Russell,[1] Ransom *v.* Mack,[2] Sheldon *v.* Benham,[3] Paton *v.* Lent,[4] Laporte *v.* Landry;[5] Edwards on Bills, 602. *Exceptions overruled.*

SHELBURNE FALLS NATIONAL BANK *v.* WILLIAM P. TOWNSLEY.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, SEPTEMBER TERM, 1871.

[*Reported in* 107 *Massachusetts Reports*, 444.]

CONTRACT on two promissory notes signed by Charles W. Stockbridge, payable to the order of Franklin Ballard, indorsed by Ballard and the defendant, and discounted by the plaintiffs.

At the new trial in the Superior Court before Brigham, C. J., after the decision reported 102 Mass. 177, the defendant relied upon want of seasonable notice of the presentment and dishonor of both notes. It appeared that they were payable in New York city, one on Thursday, July 5, 1866, and the other on Saturday, July 7, 1866, and demand and protest for non-payment were seasonably made on each. The defendant admitted that he received through the post-office at Shelburne Falls in this State notices of their dishonor, sufficient in form, dated at New York city on the day of maturity of each note respectively, and signed by Myron Winslow, a notary public at that city; but testified that he could not tell when he received them, and thought that he received both at the same time, and produced them, and with them two envelopes addressed to him at Shelburne Falls, one of which bore a postmark of July 12, and that corner of the other on which postmarks are usually stamped was torn off.

To prove due notice to the defendant, the plaintiffs, among other evidence, introduced (as at the former trial) the deposition of George W. Warren, who was their cashier at the time of the dishonor of the notes, and who testified that in due course of mail, after the maturity of each note, he received from the notary Winslow on different dates notices of their non-payment; that there were three notices relating to each note, which were addressed respectively to himself as the plain-

[1] 4 Gray, 167, 170. [2] 2 Hill, 587. [3] 4 Hill, 129.
[4] 4 Duer, 231. [5] 5 Mart. n. s. 359.

tiffs' cashier, to Ballard, and to the defendant; that he could not give the precise dates when he sent these notices respectively to the defendant, but that he did so immediately upon receiving them from the notary; that he put each of them into the post-office at Shelburne Falls, addressed to the defendant at that place.

It appeared that Shelburne Falls was a village in the town of Shelburne; that the plaintiffs' bank was in Shelburne; that the defendant lived in the town of Buckland, about midway between Shelburne Falls and the village of Buckland Centre; that there was a post-office at Buckland Centre; and that the defendant was in the habit of receiving letters at both places.

"There was also evidence tending to prove (although the fact was disputed) that ordinarily the defendant was at the village of Shelburne Falls daily, and much more frequently than at Buckland Centre; and that much the larger part of his mail matter came in and went out from the Shelburne Falls post-office, although it was claimed by the defendant that Buckland was his true post-office address.

"The plaintiffs also introduced the testimony of the postmaster at Shelburne Falls, showing that usually letters put into the post-office in New York city during the business hours of any day reached Shelburne Falls during the evening of the following day, from seven to eight o'clock; but that letters mailed in the morning in New York occasionally arrived in Shelburne Falls in the afternoon of the following day. But there was no evidence to show whether the evening mails at Shelburne Falls were distributed on that or the following day. There was also testimony of the postmaster, that the outgoing mails at Shelburne Falls were closed at about noon of each day, in 1866; and that at that hour his postmark was changed, so that all letters which were dropped into the office after noon of any day would bear the postmark of the date of the next day; but that he could not say that the envelope produced by the defendant and bearing the postmark of the 12th of July was not put into the office as early as the morning of the 11th. It was testified to by the plaintiffs' witnesses, and not denied by the defendant, that the mail from New York city to Buckland passed through the Shelburne Falls post-office; and that letters from New York to Buckland, reaching Shelburne Falls on Saturday, would not arrive in the Buckland post-office till the afternoon of the following Tuesday, and also those arriving at Shelburne Falls on Tuesday would not reach Buckland until the afternoon of the following Saturday, the mails from Shelburne Falls to Buckland leaving Shelburne Falls twice a week, on Tuesdays and Saturdays, at noon."

Upon the foregoing testimony, the judge, against the objection of

the plaintiffs, instructed the jury, among other things, as follows: "If in fact the notices thus sent by the plaintiffs were within twenty-four hours after receipt by the bank received by the defendant, he may be charged as indorser. If the notes declared on were protested for non-payment in New York city on certain days, and if notifications addressed to the defendant were enclosed in an envelope addressed to the plaintiffs at Shelburne Falls, which, if duly mailed there (at New York city) on the next day, would in due course of mail arrive at Shelburne Falls on the evening after the second day after such protest (excepting when Sunday intervened between the day of protest and day of mailing), a mailing of such notices, addressed to the defendant at Shelburne Falls (his residence being in Buckland), on the next day, would not be seasonable for the purpose of notifying the defendant of such protest and charging him as indorser of said notes, as it is necessary that the notices thus remailed and addressed by the plaintiffs should reach the post-office in Shelburne as early substantially as they would have arrived there, if mailed and addressed to him at the Shelburne Falls post-office by said notary in New York."

Under these instructions, the jury returned a verdict for the defendant, and also answered the following questions in the negative: 1. "Did the defendant receive seasonable notice of the protest of the notes in suit, or of the protest of either of them?" 2. "Did the plaintiffs mail the notices at the Shelburne Falls post-office substantially as soon as they arrived there, so that they were in the post-office, addressed to the defendant, substantially as soon as if they had been mailed and directed to him at Shelburne Falls by the notary in New York?" The plaintiffs alleged exceptions.

S. T. Field, for the plaintiffs, cited Seneca County Bank *v.* Neass,[1] Morris *v.* Husson,[2] Bradley *v.* Davis,[3] Manchester Bank *v.* Fellows,[4] Jones *v.* Lewis,[5] Timms *v.* Delisle,[6] Bell *v.* State Bank,[7] Fisher *v.* State Bank,[8] Foster *v.* Sineath,[9] Carson *v.* State Bank,[10] Walker *v.* Bank of Augusta,[11] Barret *v.* Evans,[12] Linn *v.* Horton,[13] Eagle Bank *v.* Hathaway,[14] Fitchburg Bank *v.* Perley, True *v.* Collins,[15] Cabot Bank *v.* Warren,[16] Bank of Columbia *v.* Lawrence, United States Bank *v.* Carneal.[17]

W. S. B. Hopkins (*D. Aiken* with him), for the defendant.

[1] 5 Denio, 329.
[2] 4 Sandf. 93.
[3] 26 Maine, 45.
[4] 8 Foster, 302.
[5] 8 W. & S. 14.
[6] 5 Blackf. 447.
[7] 7 Blackf. 456.
[8] 7 Blackf. 610.
[9] 2 Rich. 338.
[10] 4 Ala. 148.
[11] 3 Georgia, 486.
[12] 28 Missouri, 331.
[13] 17 Wis. 151.
[14] 5 Met. 212.
[15] 8 Allen, 433.
[16] 10 Allen, 522.
[17] 2 Pet. 648, 649.

AMES, J. When this case was before the court on a former occasion, it was decided that, under the circumstances, the plaintiffs could not charge the defendant as an indorser, by proof that a notice from themselves had been deposited in the post-office at Shelburne Falls, directed to him as of that place. There was a post-office at the defendant's place of residence, and a letter transmitted by mail would have reached him there. If the plaintiffs saw fit to consider him as residing at Buckland, they could have notified him by mail. If they chose, for the purposes of notice, to treat him as a resident of Shelburne Falls, the drop-letter was not a sufficient notice, without proof that it actually and seasonably reached him. Upon an examination of all the authorities now cited by the plaintiffs, we find no case in which it is held that an indorser, living in a post town, is properly notified by a drop-letter, left for him in the post-office in another town, where the holder resides, and addressed to the indorser as if he also resided there, even though it should appear that the indorser is in the habit of resorting to the post-office in each of the two places.

It was also decided at the former hearing that the defendant might be charged as indorser as upon a notice directly from the notary in New York, if the notice for him was returned to the post-office seasonably, in accordance with the decision in Eagle Bank *v.* Hathaway.[1] This left no question to be tried, except the single and simple one of the truth of the testimony of the cashier, that he addressed and returned the notice to the post-office immediately upon its receipt. If he did so, the plaintiffs were entitled to recover. The case of Eagle Bank *v.* Hathaway assumes that, if so redeposited on the same day as received, the notice would reach the indorser substantially as soon as if originally directed to him, and holds such notice to be sufficient. If received at night or after business hours, and redeposited the next day, there might be some question of fact whether the delay over night made any difference. But no such question appears to be raised here.[2]

The answer of the jury to the second inquiry put to them appears to cover the question thus presented. But from the instructions given we are led to apprehend that it was unnecessarily and improperly involved with another question, as to the probability of its earlier receipt, if otherwise directed from New York, depending upon the ordinary course of the mails between these two places. The jury were told that if notices sent from New York on the day after the

[1] 5 Met. 212.

[2] Warren *v.* Gilman, 17 Me. 360; Bell *v.* Hagerstown Bank, 7 Gill, 216; Eagle Bank *v.* Hathaway, 5 Met. 212; Mo. Bank *v.* Vaughan, 36 Mo. 90; Manchester Bank *v.* Fello, 28 N. H. 302, *accord*. — ED.

protest would in due course of mail arrive at Shelburne Falls on the evening of the second day after protest, a remailing of such notices, addressed to the defendant, on the next, being the third day after the protest, would not be seasonable. If the jury followed this instruction, they may have felt bound to answer the second question, as they did, in the negative, without regard to the time when the notice actually reached Shelburne Falls, and came to the hands of the plaintiffs' cashier. This would be applying a wrong measure of time and a wrong test of diligence to the replacing of the notice in the post-office. The question was not what would be the proper time therefor, measured by the ordinary course of the mails from New York, but what was the proper time having regard to the actual receipt of the notice by the plaintiffs' cashier. If he replaced the notice, properly addressed, in the post-office immediately or without unreasonable or unnecessary delay, that was enough to entitle the plaintiffs to recover, although it might have been three or more days after the protest. On this point we feel bound to

Sustain the exceptions.[1]

[1] If a holder notifies only one party directly, enclosing notices to be forwarded by him to prior parties, the holder incurs the risk of the miscarriage of his letter, or of the failure on the part of the party to whom it is addressed, to forward the enclosed notices. Stix v. Mathews, 68 Mo. 371, 375. But see Wamesit Bank v. Buttrick, 11 Gray, 367, *contra*. — Ed.

SECTION III.

Protest.

CHATERS *v.* BELL AND ANOTHER.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JULY 9, 1801.

[*Reported in* 4 *Espinasse*, 48.]

THIS was an action of assumpsit, to recover the amount of a bill of exchange for £191, drawn from Ireland by the plaintiff, as indorsee, against the defendant, as indorser, who resided in Liverpool.

The bill was payable in London, at the house of Thomas Carter; it became due the 24th of April, on which day it was presented at the house of Mr. Carter, and refused payment, on the ground of there being no effects; it was then noted, and on the 25th returned to the bankers by the notary.

It was regularly returned to Liverpool, and the money demanded of the defendants, who at first offered to pay the amount, together with some charges, amounting together to £191: this was not then accepted, and, being afterwards again demanded, the defendants refused to pay it, because there was no regular protest.

On the 14th of May afterwards, the notary who had noted it protested the bill in form; and the present action was brought.

The defence set up was the want of a protest, which, it was contended by the defendant's counsel, was necessary and essential to give a title to the holder to demand the money, and which protest ought to be drawn up and dated of the same day with the refusal of payment of the bill. They cited Gale *v.* Welsh.

The plaintiff's counsel relied on the usage, to note the bill merely for non-acceptance or non-payment by the notary who presented it, and that he could draw up the protest in form at any subsequent time, and cited Bull. N. P. 271.

LORD KENYON said, he was of opinion that if the bill was regularly presented and noted at the time, that the protest might be made at any future period. It was certainly necessary to have the protest, for the purpose of litigation; as in declaring on the bill, if it was a foreign one, the case cited had decided that the protest must be stated and proved; but that case went no further, and was silent as to the time when the protest should necessarily be made; but though not made at the time of the refusal, if regular notice of non-payment had been

given, he thought the want of an actual protest afforded no justifiable ground in law to the indorser to refuse payment of the bill.

On the application of the defendant's counsel, the point was reserved. Verdict for the plaintiff, subject to the opinion of the court.

Erskine and *Courthope*, for the plaintiff.

The *Attorney-General* and *Gibbs*, for the defendant.

The case came on afterwards to be argued; but a *venire facias de novo* was awarded, and the cause came on again to be tried before Lord Ellenborough, who expressed himself to be of the same opinion with that delivered in this case by Lord Kenyon.[1]

ALEXANDER DENNISTOUN AND OTHERS v. ROGER STEWART.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1854.

[*Reported in* 21 *Curtis*, 722; 17 *Howard*, 606.]

ERROR to the Circuit Court of the United States for the southern district of Alabama. The case is stated in the opinion of the court.

Phillips, for the plaintiffs.

No counsel, *contra*.

GRIER, J., delivered the opinion of the court.

The plaintiffs declared against the defendant, as drawer of a bill of exchange, by the name and style of James Reid & Co., of which the following is a copy: —

"MOBILE, Sept. 9, 1850.

"No. ——. £4,417 14*s*. 11*d*. st'g.

"Sixty days after sight of this of first exchange (second and third unpaid), pay to the order of ourselves, in London, forty-four hundred and seventeen pounds, 14*s*. 11*d*. st'g., value received, and charge the same to account of 1,058 bales cotton per 'Windsor Castle.'

"Your obedient servants,

"*Pr. pro* JAMES REID & Co.,

"WM. MOULT, Jr.

"To HY. GORE BOOTH, Esq., Liverpool."

[1] Goostrey *v.* Mead, Bull. N. P. 272; Geralopulo *v.* Wieler, 10 C. B. 690; Commercial Bank *v.* Barksdale, 36 Mo. 563, *accord*.

The presentment and noting of the bill and the drawing up of the instrument of protest must be the acts of one and the same notary. Commercial Bank *v.* Barksdale, 36 Mo. 563.

The protest for non-payment should be made in the place where the bill is payable.

See Mitchell *v.* Baring, 10 B. & C. 4; M. & M. 381; 4 C. & P. 35, s. c.; St. 2 & 3 Will. IV. c. 98. — ED.

"*Acceptance across the face of the bill.*

"Seventh October, 1850. Accepted for two thousand five hundred and seventy-one pounds eighteen shillings and seven pence, being balance unaccepted for acpt. 1,058 bf. cotton, pr. Windsor Castle, payable at Glyn & Co.

"*Pr. pro* HENRY GORE BOOTH,
"AND. E. BYRNE.

"Due 9 Decem.

"Indorsed:—

"Pay Messrs. A. Dennistoun & Co. or order.

"*Pr. pro* JAMES REID & Co.,
"WM. MOULT, Jr."

After reading this bill, with its indorsement, the plaintiff offered in evidence a regular protest, indorsed on a copy of a bill agreeing in every particular with the above, except that for "And. E. Byrne" was written "Chas. Byrne."

The defendant objected to the reading of the protest in evidence, because it did not describe the bill of exchange produced by the plaintiffs, but a different bill. The court sustained this objection, and excluded the protest from the jury, which is the subject of the first bill of exceptions.

A protest is necessary by the custom of merchants in case of a foreign bill, in order to charge the drawer. It is defined to be in form "a solemn declaration written by the notary under a fair copy of the bill, stating that the payment or acceptance has been demanded and refused, the reason, if any, assigned, and that the bill is, therefore, protested."

A copy of the bill, it is said, should be prefixed to all protests, with the indorsements transcribed *verbatim*. 1 Pardess. 444; Chitty on Bills, 458.

However stringent the law concerning mercantile paper, with regard to protest, demand, and notice, may appear, it is nevertheless founded on reason and the necessities of trade. It exacts nothing harsh, unjust, or unreasonable. A protest, though necessary, need only be noted on the day on which payment was refused. It may be drawn and completed at any time before the commencement of the suit, or even before the trial, and consequently may be amended according to the truth, if any mistake has been made.

The copy of the bill is connected with the instrument certifying the formal demand by the public officer, as the easiest and best mode of identifying it with the original. Mercantile paper is generally brief, and without the verbiage which extends and enlarges more

formal legal instruments. Hence, it is much easier to give a literal copy of such bills than to attempt to identify them by any abbreviation or description. The amount, the date, the parties, and the conditions of the bill, form the substance of every such instrument. Slight mistakes, or variances of letters or even words, when the substance is retained, cannot and ought not to vitiate the protest. A lost bill may be protested, when the notary has been furnished with a sufficient description as to date, amount, parties, &c., to identify it.

In indictments for forgery, it is not sufficient to state the "substance and effect" of the instrument: it must be laid according to the "tenor," or exact letter; but the law-merchant demands no such stringency of construction. The sharp criticism indulged when the life of a prisoner is in jeopardy cannot be allowed for the purpose of eluding the payment of just debts.

It is unnecessary that a copy of the protest should be included in the notice to the drawer and indorsers.[1] The object of notice is to inform the party to whom it is sent that payment has been refused by the maker, and that he is held liable. Hence such a description of the note as will give sufficient information to identify it is all that is necessary. What was said by Mr. Justice Story, in delivering the opinion of this court, in Mills *v.* the Bank of the United States, with regard to variances and mistakes in notices, will equally apply to protests: "It cannot be for a moment maintained that every variance, however immaterial, is fatal. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility."

In the case before us, the protest had an accurate copy of every

[1] Nor need the notice of dishonor of a foreign bill contain any statement of the fact of a protest by a notary, as appears from the following extract from the opinion of Sir W. M. James, L. J., in *Ex parte* Lowenthal, L. R. 9 Ch. 591, 593: "Then it is said that the notice of dishonor did not say in terms that the bill had been presented by a notary and protested. No doubt, being a foreign bill, it must, in order to charge the drawer, have been presented and protested by a notary public, and, according to some of the old authorities, it seems to have been supposed that the notice of dishonor ought to have been accompanied by a copy or memorial of the protest. But in the first case in which the question was formally considered, namely, in Goodman *v.* Harvey, *supra*, Vol. I. p. 709, it was decided that this was not necessary, and that it was sufficient if notice of the protest was sent. In the present case, the notice merely stated, as in the case of an English bill, that the bill had been duly presented and returned dishonored. I think that was sufficient notice to any one who knew the law (which every one must be taken to know) that every thing had been done in due form to enable the holder of this bill to proceed against the drawer." See Cromwell *v.* Hynson, *supra*, p 115. — Ed.

material fact which could identify the bill, — the date, the place where drawn, the amount, the merchandise on which it was drawn, the ship by which it was sent, the balance on the cotton for which it was accepted, the names of drawers, acceptor, indorsers; in fine, every thing necessary to identify the bill. The only variance is a mistake in copying or deciphering the abbreviations and flourishes with which the Christian name of the acceptor's agent is enveloped. The abbreviation of "And." has been mistaken for Chas., and the middle letter E. omitted. The omission of the middle letter would not vitiate a declaration or indictment. Nor could the mistake mislead any person as to the identity of the instrument described.

We are of opinion, therefore, that the objection made to this protest, "that it does not describe the bill of exchange produced, but a different bill," is not true in fact, and should have been overruled by the court.

This renders it unnecessary for us to notice the offer of testimony to prove the identity, which was also overruled by the court.

The judgment of the Circuit Court is reversed, and a *venire de novo* awarded.

SECTION IV.

In what Cases Presentment, Notice, and Protest may be dispensed with.

BICKERDIKE AND ANOTHER, ASSIGNEES OF RICHARD, A BANKRUPT, v. BOLLMAN.

IN THE KING'S BENCH, NOVEMBER 14, 1786.

[*Reported in* 1 *Term Reports*, 405.]

CASE for money had and received to and for the use of the bankrupt, before his bankruptcy. Second count, on an account stated with the bankrupt. Third, for money had and received to and for the use of the plaintiffs as assignees. Fourth, an account stated with the assignees. Plea, *non assumpsit*.

This cause was tried at the last assizes for the county Palatine of Lancaster, before Buller, J., when the jury found a verdict for the plaintiffs, subject to the opinion of this court on the following case:—

That the act of bankruptcy was committed in the middle of August, 1784. That in the month of August, 1784, the bankrupt was indebted to Greatrix & Co., the petitioning creditors, in £115 3*s*. 8*d*. That on the 15th of September, 1784, the bankrupt drew a bill for £20 on the defendant,[1] "who then until the time of the bankruptcy, and of the bill becoming due, was a creditor of the bankrupt," payable to Greatrix & Co. two months after date, and paid the same to them on account of their said debt; which bill was presented for payment on the 18th of November following, and dishonored. That no notice of the non-payment of the bill was ever given by Greatrix & Co. to the bankrupt, or left at his house. That Greatrix & Co. received the bill at Manchester on the 24th of November, between the hours of eleven and twelve at noon; but the post goes from London to Manchester in three days. The bankrupt then resided at Manchester; but in general secreted himself, and particularly on market-days, after the 20th of November, on which day a commission of bankrupt issued against him, and he was declared a bankrupt at Manchester under that commission, in the afternoon of the 24th of November, but at what hour did not appear; and that commission has since been superseded.

[1] The words between the inverted commas were added by the court on the argument with the consent of both parties.

Afterwards another commission was issued on the petition of Greatrix & Co.

The question for the opinion of the court is whether the debt, proved to be due to them under the circumstances above mentioned, is sufficient to support that commission.

Chambre, for the plaintiffs (after observing that the objection which had been raised to the petitioning creditor's debt was that the bankrupt was to be considered as discharged from the bill for £20 which he had drawn in favor of the petitioning creditor, no notice having been given to the bankrupt of the bill's having been dishonored), made three questions: —

First, that no notice was necessary to be given to the bankrupt in this case. Secondly, that, even if notice were necessary, it had virtually been given. Thirdly, that it was not competent to the defendant in this action to make the objection.

As to the first, notice must in general be given; but most of the cases have arisen where the holder has given indulgence to the acceptor, by which he is considered as having made his election to look to the acceptor only for payment. The reason on which the rule requiring notice to be given to the drawer is founded is on a supposition that he may have effects in the hands of the drawer, and that he ought to have an opportunity of recovering satisfaction from him. And a presumption arises that the drawer will suffer from the probable insolvency of the drawer, in consequence of the holder's neglecting to give notice; but in this case that presumption is repelled by stating that the bankrupt was a debtor to the drawee: therefore, the rule does not apply. By an ordinance of France,[1] the drawer, in order to discharge himself from the payment of a bill on account of his not having had notice of the non-acceptance by the drawee, must show that he had effects in the other's hands at the time of drawing. The rule requiring notice to be given to the drawer was introduced for his protection, and therefore ought not to be abused so far as to enable him to do injustice.

Secondly, as this case does not fall within the reason on which the rule of law is founded, the bankrupt, not having had effects in the hands of the drawee at the time that the bill was drawn, must be considered as having had virtual notice that the bill was not honored. Supposing, however, that the rule of law would be inflexible in an action on the bill itself, yet the question here is not altogether whether the drawer can be resorted to on the bill, but whether the circumstances here stated extinguish the preceding debt. But it has been repeatedly held that the mere drawing of a bill of exchange does not extinguish the preceding debt.

[1] Postlethw. tit. Bills of Exchange, 16 and 17 art.

Thirdly, the case of Quantock and Others v. England[1] is decisive. On a question whether a debt barred by the Statute of Limitations was sufficient to found a commission of bankrupt upon, Lord Mansfield said, "The Statute of Limitations does not destroy the debt, it only takes away the remedy. Here the debtor himself has not objected: he has submitted to the commission, and been examined under it; therefore, the objection does not now lie in the mouth of a third person;" and he said that Swain and Wallinger[2] was in point. In this case, the notice to be given was for the benefit of the bankrupt, and the slightest acknowledgment would be considered as a waiver of it.

BULLER, J. The bankrupt himself could not waive it after the bankruptcy.

Chambre. But the assignees may waive it for the purpose of supporting the commission.

Law, contra. The debt of the petitioning creditor, being reduced under £100 by the bankrupt's drawing the bill in question, is as much discharged by the laches of the holder in not giving notice of the non-acceptance of the drawee as by actual payment. And, as to the assignees waiving this objection, it is no answer in the present action. For in all cases where actions are brought by the assignees of a bankrupt, they must make out a clear title, which they cannot do without proving a legal debt of the petitioning creditor; and they cannot by their own act make that a good debt which would not be so otherwise.

As to notice not having been necessary because the drawer had no effects in the drawee's hands, that goes to measuring the inconvenience which would result in every particular case from not giving notice. But the court have always said that, whether any actual change of circumstance has or has not taken place, or whether the drawer may or may not have suffered from the negligence of the holder in not having given notice in due time, it is a strict rule of law introduced for the sake of certainty, and that the drawer may have an opportunity of resorting to the drawee. In the case of Peach and Burgess,[3] where a question arose upon the necessity of notice being given to the drawer, it was contended that no change of circumstances had taken place, or probable inconvenience had ensued, from want of notice; but Lord Mansfield said, it was a strict rule of law that notice should be given, and it must be adhered to in every case. This case does not come within the rules laid down in the cases of Tindal and Brown[4] or Medcalf and Hall,[5] as to what shall be deemed sufficient notice of non-payment or non-

[1] 5 Burr. 2628; 2 Black. 702, s. c.
[2] 2 Str. 746.
[3] Sittings at Guildhall, *cor.* Lord Mansfield.
[4] 1 T. R. 167.
[5] 3 Doug. 113.

acceptance; because here there was no notice at all. It was said by Lee, in arguing the case of Russel and Langstaff,[1] and not denied by the court, that it had been frequently ruled by Lord Mansfield at Guildhall that it is not an excuse for not demanding payment on a note or bill, or for not giving notice of non-payment, that the maker or acceptor has become a bankrupt, as many ways may remain of obtaining payment by the assistance of friends or otherwise.

The bill's having been given after the act of bankruptcy does not vary the present case, because a debt may be discharged in due course of trade, either by payment of the money after a secret act of bankruptcy, or by payment of the bill, or by dishonoring it.

With regard to the debt's being extinguished by taking this note from the bankrupt, by 3 & 4 Anne, c. 9, § 7, it is enacted that, "if any person accept a bill of exchange for £20 or upwards in satisfaction of any former debt, the same shall be accounted a full and complete payment of such debt, if such person accepting of any such bill for his debt doth not take his due course to obtain payment thereof by endeavoring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof." Here there was neither protest nor notice, and therefore the bill must be considered as complete payment.

Chambre, in reply, was stopped by the court.

ASHHURST, J. As to the general rule, it has never been disputed that the want of notice to the drawer after the dishonor of a bill is tantamount to payment by him; but that rule is not without exceptions, and particularly in the case mentioned by the plaintiff's counsel, that notice is not necessary to be given where the drawer has no effects in the hands of the drawee; for it is a fraud in itself, and, if that can be proved, the notice may be dispensed with. In this case, it appears that, at the time of drawing the bill, the drawer, so far from having any effects in the hands of the drawee, was actually indebted to him to a large amount.

But, even admitting this to be a general rule without any exception, it was certainly introduced for the benefit of the drawer. Now, every rule may be waived by the person for whose benefit it is introduced. Under the circumstances of the present case, the drawer must be considered as having waived this benefit, because the commission is founded on that creditor's debt, between whom and the drawer this transaction has happened; and his submitting to it is a waiver of the want of notice, and an admission of the debt, which admission the assignees have subsequently confirmed by bringing this action. There-

[1] Dougl. 497.

fore, I think that, as the bankrupt himself has not chosen to take advantage of it by moving to supersede the commission, it does not now lie in the mouth of a third person to do so.

BULLER, J. The last point may be laid entirely out of the case, because, unless the objection be well founded in the case of the bankrupt himself, it is immaterial to consider how far it was competent for a third person to take advantage of it. The case of Quantock and England does not apply. There the question was, whether a third person should be permitted to avail himself of the Statute of Limitations. There might be good reasons for disallowing it in that case, because the debt still remained in conscience. But here the question is, whether there was a sufficient debt to support the commission at the time when it issued.

The first point to be considered is, whether under these circumstances it was necessary to give notice within as short a time as could conveniently be done that the bill was neither accepted nor paid. I am of opinion that no such notice was necessary. On the second trial of the cause of Tindal and Brown before me at Guildhall, the jury told me they found their verdict for the plaintiff on the ground that it had not appeared from the evidence that any injury had arisen to the party from want of notice. In consequence of which, upon the subsequent trial, I told the jury that, where a bill was accepted, it was *prima facie* evidence that there were effects of the drawer in the hands of the acceptor. The mistake of the jury on the former occasion had arisen from their taking it for granted that the drawer had not been injured by the want of notice, because he had not proved it, whereas that proof lay on the plaintiff to produce. And, upon my mentioning this matter to the court, they thought that if there were no effects in the hands of the acceptor, that would vary the question very much, as the drawer could not be hurt.

The law requires notice to be given for this reason, because it is presumed that the bill is drawn on account of the drawee's having effects of the drawer in his hands; and, if the latter has notice that the bill is not accepted or not paid, he may withdraw them immediately. But if he has no effects in the other's hands, then he cannot be injured for want of notice. Soon after I sat on this bench, I tried a cause at Guildhall, on a bill of exchange, which was either drawn or accepted by a person residing in Holland; and a full special jury, under my direction, found a verdict for the plaintiff, notwithstanding no notice had been given to the drawer of the bill's having been dishonored, because he had no effects in the hands of the person on whom the bill was drawn. That verdict never was objected to; and, if it be proved on the part of the plaintiff that from the time the bill was drawn till

the time it became due the drawer never had any effects of the drawee in his hands, I think notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not, and, if he had none, he had no right to draw upon him, and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonored. On these grounds, I think the petitioning creditor's debt was sufficient to support the commission.

Besides, in the present case, as the plaintiff's counsel have truly argued, the question is not, whether an action could be maintained on the bill itself, but whether the want of notice extinguishes the debt. As to which the case is this: A, not having any effects in C's hands, draws a bill of exchange for £100 on him, in favor of B, for value received. Now, if C does not accept, and B does not give notice to A, there is an end of the bill. Then how does the case stand? A has £100 of B's in his hands, without any consideration, which therefore B may undoubtedly recover in an action for money had and received.

PER CURIAM. Let the *postea* be delivered to the plaintiffs.[1]

CORNEY v. MENDEZ DA COSTA.

AT NISI PRIUS, CORAM BULLER, J., FEBRUARY 26, 1795.

[*Reported in* 1 *Espinasse*, 302.]

ASSUMPSIT by the plaintiff as indorsee of a promissory note, drawn by Da Costa, Matson, and Bible, in favor of the defendant, and by him indorsed to the plaintiff.

The case in evidence was that Da Costa, Matson, and Bible carried on the business of druggists in London; their affairs becoming embar-

[1] Rogers v. Stephens, 2 T. R. 718; Claridge v. Dalton, 4 M. & Sel. 226; Dickins v. Beal, 10 Pet. 572; —— v. Stanton, 1 Hayw. (N. Ca.) 271; Wollenweber v. Ketterlinus, 17 Pa. 389; Oliver v. Bank of Tennessee, 11 Humph. 74; Armendiaz v. De la Serna, 40 Tex. 291, *accord*.

Similarly, a drawer for whose accommodation a bill has been accepted, or an indorser for whose accommodation a note was made, is not entitled to notice of dishonor. Sharpe v. Bailey, 9 B. & C. 44; Fitzgerald v. Williams, 6 B. N. C. 68; Thomas v. Fenton, 5 D. & L. 28; Rhett v. Poe, 2 How. 457; Evans v. Norris, 1 Ala. 511; Torrey v. Foss, 40 Me. 74; Hoffman v. Smith, 1 Cai. 157; Miser v. Trovinger, 7 Oh. St. 281; Reid v. Morrison, 2 Watts & S. 401.

Protest of a foreign bill is of course not required under circumstances which render notice of dishonor unnecessary. Rogers v. Stephens, *supra*; Legge v. Thorpe, 12 East, 171.

rassed, a meeting of their creditors was called, where it was proposed to assign by deed all their effects to trustees, for the benefit of their creditors.

A draft of a deed was accordingly prepared, but it afterwards occurred to the creditors that it would be a considerable saving of expense if the defendant who came forward to assist them would become the indorser of notes at different dates, to be given to them for the amount of their respective compositions, which notes were to be drawn payable to the defendant, and by him were to be indorsed to the different creditors.

This proposition was acceded to, and the defendant became the indorser accordingly, and took effects of the insolvent's to the amount of the composition.

The note in question was one of the notes so given, and became due on the 6th of December: it was then not paid, nor any application made to the defendant till the 14th of January following.

Adair, Serjt., for the defendant, insisted that there was clearly laches, and that the plaintiff should be nonsuited.

BULLER, J., said that it was undoubtedly necessary that an indorser of a note should have notice of the default of the maker in payment. But that was only the case where there were effects of the indorser in the maker's hands, and that he might suffer from the want of such notice; but, where there were no effects, no notice was necessary: the present was not the common case of a maker of a note, making default, and no notice given; Da Costa, the defendant, made himself liable at all events; the creditors insisted on it: he therefore was solely liable, and being so could not avail himself of want of notice.

The plaintiff had a verdict.[1]

DENNIS v. MORRICE.

AT NISI PRIUS, CORAM LORD KENYON, C. J., JUNE 6, 1800.

[*Reported in* 3 *Espinasse*, 158.]

THIS was an action of assumpsit to recover the amount of a bill of exchange drawn by the defendant Morrice on Siardet & Co., in favor of Barbier Bobbier & Co., and indorsed to the plaintiff.

The defendant was a foreigner: he had no notice of the non-

[1] Ray v. Smith, 17 Wall. 411, *accord*.

See Brown v. Maffey, 15 East, 216, 222; Bayley, Bills (6th ed.), 306. — ED.

payment by the acceptors; but, being asked to pay the bill, he said, "I am not acquainted with your laws; if I am bound to pay it, I will."

Gibbs, for the plaintiff. The money was in the hands of Siardet & Co. at the time of the demand made on the defendant: the plaintiff might have had it from them at any time. The principle upon which notice has been held to be necessary to be given to the drawer is that he may receive a prejudice from the want of notice, as he might take his effects out of the hands of the drawee: if, therefore, I can show that no prejudice whatever arose to the drawer from the want of notice, that shall dispense with the necessity of it. If the plaintiff is not allowed to go into this kind of evidence, the drawer must hold the money received from the payee as the consideration of the bill, without the possibility of its ever being recovered.

Lord Kenyon. I cannot hold the law to be so. The only case in which notice is dispensed with is where there are no effects of the drawer in the drawee's hands. This would be extending the rule still further than ever has been done, and opening new sources of litigation, in investigating whether in fact the drawer did receive a prejudice from the want of notice or not.

The evidence was therefore rejected, and the plaintiff was nonsuited.[1]

PORTHOUSE v. PARKER and Others.

At Nisi Prius, coram Lord Ellenborough, C. J., December 14, 1807.

[*Reported in* 1 *Campbell*, 82.]

This was an action against the drawers of a bill of exchange for £461 3*s*. at the suit of the payee.

The bill purported to be drawn by one Wood, as the agent of George, James, and John Parker, upon John Parker. There was no proof that Wood had authority from the defendants to draw the bill; but a witness swore that he, as the agent of John Parker, the drawee and one of the defendants, had accepted it on his account.

Lord Ellenborough held that the bill having been accepted by order of one of the defendants, this was sufficient evidence of its having been regularly drawn; and, further, that the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove

[1] Hill *v.* Martin, 12 Mart. 177, *accord*. — Ed.

that the defendants had received express notice of the dishonor of the bill, as this must necessarily have been known to one of them, and the knowledge of one was the knowledge of all.

Verdict for the plaintiff.[1]

BLACKHAN v. DOREN.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 4, 1810.

[*Reported in* 2 *Campbell*, 508.]

ACTION against the defendant, as drawer of a bill of exchange for £250, dated Kingston, Jamaica, October 1, 1809, on Messrs. Hunter & Co., in London, at six months after sight.

The bill was refused acceptance.

To excuse the sending of notice of the dishonor of the bill to the defendant, the plaintiff called a clerk of the drawees, who stated that when it was presented they had produce in their hands belonging to him to the amount of about £1,500; but that he owed them £10,000 or £11,000, and that they had appropriated the effects in their hands to go in satisfaction of this debt.

LORD ELLENBOROUGH. If a man draws upon a house with whom he has no account, he knows that the bill will not be accepted: he can suffer no injury from want of notice of its dishonor, and therefore he is not entitled to such notice. But the case is quite otherwise where the drawer has a fluctuating balance in the hands of the drawee. There notice is peculiarly requisite. Without this, how can the

[1] Rhett *v.* Poe, 2 How. 457; New York Co. *v.* Selma Bank, 51 Ala. 305; Fuller *v.* Hooper, 3 Gray, 334; Gowan *v.* Jackson, 20 Johns. 176; Taylor *v.* Young, 3 Watts, 339 (*semble*); West Bank *v.* Fulmer, 3 Barr, 399; Harwood *v.* Jarvis, 5 Sneed, 375 (*semble*), *accord.*

Conf. Foland *v.* Boyd, 23 Pa. 476.

But the fact that one of the parties to a bill occupies the double position of drawer and drawee does not excuse the want of presentment. Dwight *v.* Scovil, 2 Conn. 654. A bill in which the drawer and drawee are the same person being in effect a promissory note, Miller *v.* Thomson, *supra*, Vol. I. p. 188, notice of its dishonor to the drawer is of course superfluous: Roach *v.* Ostler, 1 M. & Ry. 120; Dennis *v.* Table Co., 10 Cal. 369; Bailey *v.* South-western Bank, 11 Fla. 266; Raymond *v.* Mann, 45 Tex. 301; and under the anomalous doctrine that the maker of a note must, like an ordinary debtor, seek his creditor, the drawer of such a bill may also be charged without presentment: Bailey *v.* South-western Bank, *supra*; Indiana R.R. *v.* Davis, 20 Ind. 6 (overruling several prior cases in Indiana); Maux Ferry Co. *v.* Branegan, 40 Ind. 361; Fairchild *v.* Ogdensburg R.R., 15 N. Y. 337; Mobley *v.* Clark, 28 Barb. 390. — ED.

drawer know that credit has been refused to him, and that his bill has been dishonored? It is said here that the effects in the hands of the drawees were all appropriated to discharge their own debt; but that appropriation should appear by writing, and the defendant should be a party to it. I wish that notice had never been dispensed with, and then we should not have been troubled with investigating accounts between drawer and drawee. I certainly will not relax the rule still farther, which I should do, if I were to hold that notice was unnecessary in the present instance. *Plaintiff nonsuited.*

HAMMOND AND OTHERS v. DUFRENE.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 16, 1811.

[*Reported in* 3 *Campbell*, 145.]

THIS was an action on a bill of exchange for £301 17*s*. 10*d*., dated 25th April, 1811, drawn by the defendant upon and accepted by Messrs. Dufrene & Penny, payable at three months after date.

To excuse the proof of notice to the defendant of the dishonor of the bill, one of the acceptors was called, who stated that when the bill was drawn and accepted they had no effects of the drawer in their hands, but that, before the bill became due, he paid a sum of £400 on their account.

Park, for the plaintiff, insisted that this was an accommodation bill, and that the drawer therefore was not entitled to notice of its dishonor.

LORD ELLENBOROUGH. I think the drawer has a right to notice of the dishonor of a bill, if he has effects in the hands of the acceptor at any time before it becomes due. In that case, he may reasonably expect that the bill will be regularly paid, and he may be prejudiced by receiving no notice that it is dishonored. I am aware that the inquiry has generally been as to the state of accounts between the drawer and drawee when the bill was drawn or accepted; but I conceive the whole period must be looked to from the drawing of the bill till it becomes due, and that notice is requisite if the drawer has effects in the hands of the drawee at any time during that interval. Therefore, if the defendant in this case paid a sum of money for Messrs. Dufrene and Penny before the 28th July, you must prove that he had due notice it was not paid on that day by the acceptors.

The case was afterwards brought before the court, but the direction of the judge at Nisi Prius upon this point was not questioned.

THACKRAY *v.* BLACKETT.

At Nisi Prius, coram Lord Ellenborough, C. J., January 11, 1812.

[*Reported in* 3 *Campbell*, 164.]

This was an action on two bills of exchange drawn by the defendant on Preston & Sons, payable to his own order, and indorsed by him to the plaintiff. The first for £1,833 7*s.* was dated 10th October, 1809, the other for £1,835 18*s.* 9*d.* the 17th of October, 1809, and both were at six months after date.

After the bills had been accepted and indorsed, and some time before either was due, they were left for payment with the acceptors, who by mistake destroyed them. The plaintiff immediately gave notice of this circumstance to the defendant, and required him, as drawer, to give new bills in their stead according to the statute 9 & 10 Wm. III. c. 17. This the defendant refused to do. In a few days after, Preston & Sons became insolvent. The bills, however, as they respectively became due, were presented for payment; but no regular notice was sent to the defendant of their dishonor. The bills were drawn merely for the defendant's accommodation; but, before they became due, he had contracted engagements on account of Preston & Sons to the amount of about £1,000, and they were so much indebted to him at the time when they stopped payment. The objection being taken that the defendant was discharged for want of due notice of the dishonor of the bills,

The *Attorney-General*, for the plaintiff, contended that under the circumstances of the case no such notice was necessary. Before the bills were due, the defendant was informed they were destroyed; and, being likewise aware that the acceptors were insolvent, he must have known perfectly well that they could not be paid. Notice of the dishonor of the bills would have given him no information, and he could not possibly have suffered any prejudice from the want of it. At any rate, the objection could only apply to the first bill; for that alone would absorb the whole balance due from the acceptors, and leave the other a pure accommodation bill from its date till the moment it became due.

Lord Ellenborough. It is well settled that the insolvency or bankruptcy of the acceptor does not dispense with due notice of the dishonor of the bill being given to the drawer.[1] Then, does it make

[1] Nicholson *v.* Gouthit, 2 H. Bl. 609; Russel *v.* Langstaffe, 2 Doug. 514; Bowes *v.* Howe, 5 Taunt. 30; Boultbee *v.* Stubbs, 18 Ves. 21 (*semble*); Esdaile *v.* Somerby, 11

any difference in this case that the bills were destroyed before they became due? I think not; for they might still have been paid with or without an indemnity, and the defendant, not hearing that they were dishonored, might have been prevented from pressing his remedy against the acceptors. The excuse of want of effects in their hands, I think, is equally unavailing as to both bills. I cannot make any distinction between the two. If there was an open account between the parties, and the acceptors were indebted in any sum to the drawer before the bills became due, I cannot say that he must necessarily have been aware beforehand that either of them would be dishonored. Judges of great authority have doubted of the propriety of the rule laid down in Bickerdike *v.* Bollman; and I certainly will not give it any extension. *Plaintiff nonsuited.*

In the ensuing term, the Attorney-General was refused a rule to show cause why there should not be a new trial, all the judges being of opinion that the defendant was entitled to notice of the dishonor of both bills.

RUCKER AND OTHERS *v.* HILLER.

IN THE KING'S BENCH, JUNE 2, 1812.

[*Reported in* 16 *East*, 43.]

TADDY moved to set aside a nonsuit in this case, and stated that the plaintiffs sued as indorsees of a bill of exchange against the drawer; and at the trial before Lord Ellenborough, C. J., at Guildhall, were nonsuited, for want of proving notice to the drawer of the non-acceptance of the bill by the drawee; it appearing that the drawer, though he had no effects in the drawee's hands at the time of drawing the bill, or when it was presented for acceptance, had yet drawn in expectation of funds in time to satisfy the bill, having shipped goods upon his own account, which were on their way to the drawee, but not having remitted to him the bills of lading or invoices; in conse-

East, 114; Smith *v.* Becket, 13 East, 187; Whitfield *v.* Savage, 2 B. & P. 277; *Ex parte* Rohde, Mont. & M. 430; Hightower *v.* Ivy, 2 Port. (Ala.) 308; Seaford Bank *v.* Connoway, 4 Houst. 206; Clair *v.* Barr, 2 A. K. Marsh. 255; Gower *v.* Moore 25 Me. 16; Hunt *v.* Wadleigh, 26 Me. 271; Armstrong *v.* Thruston, 11 Md. 148 Sanford *v.* Dillaway, 10 Mass. 52; Crossen *v.* Hutchinson, 9 Mass. 205; Farnum *v* Fowle, 12 Mass. 92; Lawrence *v.* Langley, 14 N. H. 70; Benedict *v.* Caffe, 5 Duer, 226; Denny *v.* Palmer, 5 Ired. 610; Barton *v.* Baker, 1 S. & R. 334; Allwood *v* Haseldon, 2 Bail. 457; Nash *v.* Harrington, 2 Aik. 9; Wilson *v.* Senier, 14 Wis. 380, *accord*.

Stothart *v.* Parker, 1 Tenn. 260, *contra*. — ED.

quence of which the drawee had returned the bill when presented to him, marked "no effects." This notification, he contended, dispensed with the necessity of giving notice of the dishonor, to the drawer, as it would have been nugatory to give notice. [*Reader*, who was counsel for the defendant at the trial, observed that the fact had turned out to be that the drawee had refused to take to the goods because they were damaged.]

LORD ELLENBOROUGH, C. J. Where the drawer draws his bill on the *bona fide* expectation of assets in the hands of the drawee to answer it, it would be carrying the case of Bickerdike *v.* Bollman further than has ever been done, if he were not at all events entitled to notice of the dishonor. And I know the opinion of my Lord Chancellor to be that the doctrine of that case ought not to be pushed further. The case is very different where the party knows that he has no right to draw the bill. There are many occasions where a drawee may be justified in refusing from motives of prudence to accept a bill, on which notice ought nevertheless to be given to the drawer; and, if we were to extend the exception further, it would come at last to a general dispensation with notice of the dishonor in all cases where the drawee had not assets in hand at the very time of presenting the bill, and thus get rid of the general rule requiring notice, than which nothing is more convenient in the commercial world. A *bona fide* reasonable expectation of assets in the hands of the drawee has been several times held to be sufficient to entitle the drawer to notice of the dishonor, though such expectation may ultimately have failed to be realized. We held this opinion in the case of Brown *v.* Maffey[1] so lately as in last Hilary term, and cannot rescind our determinations. If we are still supposed to be in an error, the plaintiffs may bring another action, and tender a bill of exceptions.

BAYLEY, J. The general rule requires notice of the dishonor to be given in due time to the drawer; and it lay upon the plaintiffs to show that he could not possibly be injured by the want of it. It would be somewhat hard to call upon a drawer towards the end of six years after the bill was given, and, when he objected that he had no notice of the dishonor, to tell him that he had no effects in the drawee's hands at the time when the bill was presented, though they might have come to his hands the very day after, and the drawer might have settled his accounts with the drawee in the mean time upon the presumption that the bill was paid.

Per Curiam. Rule refused.[2]

[1] 15 East, 216.

[2] In accordance with the decision of the principal case, it is well settled that due presentment to the drawee or acceptor, and notice of dishonor to the drawer, are

LEACH v. HEWITT.

In the Common Pleas, February 4, 1813.

[*Reported in* 4 *Taunton*, 731.]

This was an action upon a bill of exchange purporting to be dated from the Northampton Bank, Sept. 22, 1811, and to be drawn by W. Crooke, as agent for Rogers, Crooke, & Company, upon and purporting to be accepted by Rogers & Co., 83 Lombard Street, in favor of the defendant or order. Upon the trial of the cause at the London sittings after Hilary term, 1812, before Mansfield, C. J., it appeared that the bill had been indorsed by Hewitt, at the request of a person named Cattle, who had passed it to Robson, who had passed it to Percy, who transferred it to the plaintiff for a valuable consideration, viz., in payment for some wine. When the bill was due, Dawson & Co., the bankers of the plaintiff, attempted to present it for payment according to the direction, but found no such house as Rogers & Co. in Lombard Street, nor upon inquiry was there any such house as Rogers, Crooke, & Co. constituting the Northampton Bank, and the bill was a mere fabrication of Cattle's, who assumed the style of Rogers, Crooke, & Co., for the purpose of fraud. After four days, the holder found the defendant, who lived in Clerkenwell, and at first denied his signature, but afterwards confessed it. The officer had no difficulty in finding him to arrest. The defence was that he had not had due notice of the dishonor of the bill. On the other hand, it was urged that the defendant had taken the bill without consideration, and therefore was not entitled to notice, inasmuch as the drawer, who was a fictitious person, clearly had no value in the acceptor's hands, who was also a fictitious person. There was no evidence that the defendant was

indispensable wherever the drawer has reasonable ground to expect the bill will be paid, notwithstanding the fact that he has no assets in the drawee's hands. See Orr *v.* Maginnis, 7 East, 359; Clegg *v.* Cotton, 3 B. & P. 239; Robins *v.* Gibson, 3 Camp. 334; Spooner *v.* Gardiner, Ry. & M. 84; Lafitte *v.* Slatter, 6 Bing. 623; Williams *v.* Brashear, 19 La. 370; Campbell *v.* Pettengill, 7 Greenl. 126 (*semble*); Orear *v.* MacDonald, 9 Gill, 350; Grosvenor *v.* Stone, 8 Pick. 79; Ritchie *v.* McCoy, 21 Miss. 541; Dunbar *v.* Tyler, 44 Miss. 1; Adams *v.* Darby, 28 Mo. 162; Robinson *v.* Ames, 20 Johns. 146, in which cases due presentment and notice were held necessary; and Claridge *v.* Dalton, 4 M. & Sel. 226; Rhett *v.* Poe, 2 How. 457; Valk *v.* Simmons, 4 Mas. 113; Eichelberger *v.* Finley, 7 Har. & J. 381; Schuchardt *v.* Loney, 36 Md. 590; Fuller *v.* Hooper, 3 Gray, 334; Sutcliffe *v.* McDowell, 2 N. & McC. 251, in which cases presentment and notice were held unnecessary.

Conf. Foard *v.* Womack, 2 Ala. 868; Tarver *v.* Nance, 5 Ala. 712; Mobley *v.* Clark, 28 Barb. 390; Harwood *v.* Jarvis, 5 Sneed, 575. — Ed.

party to the fraud. Mansfield, C. J., directed the jury that, if the defendant were a party to the fraud, he was not entitled to notice; but that if his conduct was not fraudulent, but he took the bill innocently, he was entitled to notice: whereupon, the jury found that the defendant was not privy to the fraud. The plaintiff was nonsuited for want of notice.

Vaughan, Serjt., in Easter term, 1812, obtained a rule *nisi* to set aside the nonsuit and have a new trial, upon the authority of De Berdt v. Atkinson,[1] where Buller, J., lays it down that the rule requiring notice is only applicable to the case of fair transactions, where the bill or note has been given for value, in the ordinary course of trade. It was said that the insolvency of the drawer did not take away the necessity of notice: that was true where value had been given, but no further. In that case, it was plain that the defendant had lent his name merely to give credit to the note, and was not an indorser in the common course of business.

Best, Serjt., now showed cause against this rule. The bill was a fraudulent transaction, but the defendant was no party to the fraud. The officer found him without difficulty. The plaintiff knew his abode four days after the bill became due; and, with diligence applied at an earlier period, the plaintiff might have found him in time to give him due notice of the dishonor of the bill. The indorser was entitled to notice, unless he had been implicated in the fraud, which the jury had expressly disaffirmed.

Vaughan, in support of his rule, contended, first, that the evidence showed that the defendant was implicated in the fraud, since he had been prevailed on, as he himself declared, by Crooke, to put his name on the bill. Secondly, even if he were not, the drawer and acceptor being non-entities, he was not injured by the want of notice, and therefore was not entitled to insist upon it as a defence. But, further, if he was entitled to notice, he had dispensed with it by not having a known residence. In the case of Bateman v. Joseph,[2] it was determined that, if the holder cannot find the indorser's place of residence, he needs not to give him notice.

MANSFIELD, C. J. It is the defendant's own fault if he has indorsed a bill of persons who cannot answer over to him, and he must be the sufferer thereby, but he has only placed himself in the common situation of an indorser. It appears that the plaintiff knew where to find him after the fourth day.

CHAMBRE, J. Mr. Barnes, the learned editor of my brother Bayley's work on Bills of Exchange, has subjoined in p. 136 a very sensible note upon the case of De Berdt v. Atkinson. He says: "The court

[1] 2 H. Bl. 386. [2] 12 East, 433.

appear to have proceeded on a misapplication of the rule which obtains as to accommodation acceptances: in those cases, the drawer being himself the real debtor, acquires no right of action against the acceptor by paying the bill, and suffers no injury from want of notice of non-payment by the acceptor. But in this case the maker was the real debtor, and the payee a mere surety, having a clear right of action against the maker upon paying the note, and therefore entitled to notice, to enable him to exert that right."

GIBBS, J. The indorser undertakes to pay, if those who ought to pay do not. Therefore, he is entitled to notice, that he may have his remedy against them. *Rule discharged.*[1]

PHIPSON v. KNELLER.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 14, 1815.

[*Reported in* 1 *Starkie*, 116.]

ASSUMPSIT by the indorsee of a bill of exchange against the drawer.

Three days before the bill became due, Kneller, the drawer, upon inquiry made by the holder, told him that the bill when due would not be paid by the acceptor, and said he would not give his own address, but would call in a few days and inquire whether the bill had been paid or not.

LORD ELLENBOROUGH. No legal proposition can be more clear than that where a party says, my residence is immaterial, I will inquire whether the bill is paid, he thereby takes upon himself the *onus* of making inquiry and dispenses with notice.

Verdict for the plaintiff.[2]

[1] See Burrill v. Smith, 7 Pick. 291; Collier v. Budd, 7 Mo. 485; Farmers' Bank v. Van Meter, 4 Rand. 553.

The infancy of the acceptor or maker of course forms no excuse for non-presentment of a bill or note. Wyman v. Adams, 12 Cush. 210. — ED.

[2] Brett v. Levett, 13 East, 213; Hill v. Heap, Dow. & Ry. N. P. 57; Burgh v. Legge, 5 M. & W. 418; Union Bank v. Hyde, 6 Wheat. 572; Sigerson v. Mathews, 20 How. 496; Fisher v. Price, 37 Ala. 407; Lary v. Young, 13 Ark. 401; Minturn v. Fisher, 7 Cal. 573; Mills v. Beard, 19 Cal. 158; Norton v. Lewis, 2 Conn. 478; Havens v. Talbott, 11 Ind. 328; First Bank v. Ryerson, 28 Iowa, 508; Wall v. Bry, 1 La. An. 312; Ball v. Greaud, 14 La. An. 305; Marshall v. Mitchell, 35 Me. 221; Duvall v. Farmers' Bank, 7 Gill & J. 44; Barker v. Parker, 6 Pick. 80; Gilbert v. Dennis, 3 Met. 495; Gove v. Vining, 7 Met. 212; Whitney v. Abbot, 5 N. H. 378; Amoskeag Bank v. Moore, 37 N. H. 539; Leffingwell v. White, 1 Johns. Cas. 99; Leonard v. Gary, 10 Wend. 504; Spencer v. Harvey, 17 Wend. 489; Coddington v. Davis, 1 Comst. 186; Sheldon v. Chapman, 31 N. Y. 644; Purchase v. Mattison,

CORY AND OTHERS v. SCOTT.

IN THE KING'S BENCH, JUNE 3, 1820.

[*Reported in* 3 *Barnewall & Alderson*, 619.]

ASSUMPSIT. The plaintiffs were indorsees of the following bill of exchange drawn by the defendant, and dated March 6, 1819: —

"Three months after date, pay to my order the sum of two hundred and twelve pounds sixteen shillings and sixpence, for machinery.

"G. SCOTT.

"To Mr. JOHN GORDON, 17 Finch Lane, Cornhill."

The bill, having been accepted by Gordon, was indorsed by the defendant to R. Lough & Co., and by them to the plaintiffs. It appeared upon the trial before Abbott, C. J., at the London sittings after last Michaelmas term, that the bill was drawn for the accommodation of Lough & Co., and that neither the defendant nor Lough & Co. had any effects in the hands of Gordon the acceptor, who was a stranger to the defendant, and had accepted the bill solely for the accommodation of Lough & Co. No notice of the dishonor of the bill was given to the defendant. The declaration, after stating the default of Gordon the acceptor to pay the bill when due, contained an averment, as follows: "of which said several premises the defendant afterwards, to wit, &c., had notice." These facts having appeared, the Lord Chief Justice was of opinion that the plaintiff must be nonsuited in consequence of no notice having been given of the dishonor of the bill. Gurney, in last Hilary term, in pursuance of leave reserved to him at the trial, moved to set aside this nonsuit and to enter a verdict for the plaintiff, on the ground that notice was not in this case necessary; and he cited Bickerdike *v.* Bollman [1] and Walwyn *v.* St. Quintin.[2]

6 Duer, 587; Jacks *v.* Darrin, 8 E. D. Sm. 557; Taylor *v.* French, 4 E. D. Sm. 458; Bruce *v.* Lytle, 13 Barb. 168; Sheldon *v.* Horton, 43 N. Y. 93; Hunter *v.* Hook, 64 Barb. 468; Williams *v.* Brobst, 10 Watts, 111; Scott *v.* Greer, 10 Barr, 108; Ridgeway *v.* Day, 18 Pa. 208; Scull *v.* Mason, 48 Pa. 99; Lilley *v.* Miller, 2 N. & McC. 257, *accord*.

See, to the same effect, Prideaux *v.* Collier, 2 Stark. 57; Miranda *v.* City Bank, 6 La. 740; Peirce *v.* Whitney, 29 Me. 188; Grant *v.* Spencer, 1 Montana, 136; Cayuga Bank *v.* Dill, 5 Hill, 408, in which cases the language or conduct of the drawer or indorser was held not to amount to a dispensation of presentment and notice. — ED.

[1] 1 B. & P. 652.

Reader now showed cause. It is not necessary, perhaps, to discuss the question whether in this case notice of dishonor was requisite; for by the form of the declaration the plaintiffs have made it incumbent on themselves to prove it, for they have expressly stated that the defendant had notice. In Orr *v.* Maginnis[1] and Legge *v.* Thorpe,[2] which were both cases where the necessity of notice was sought to be dispensed with, special averments were introduced into the declaration for that purpose. A party must declare either according to the fact or the legal effect, but neither is done here; for the want of effects in the acceptor's hands amounts to an excuse for not giving notice, but not to notice. The case of Reeson *v.* Pigott[3] seems to have gone on this principle. There the proof that the drawer could not be found, which would be a valid excuse for non-presentment, was held not to be sufficient in a case where the declaration contained an averment of presentment. The proof of a subsequent promise is sufficient; for that affords evidence of the truth of all the allegations in the declaration being tantamount to an admission by the party. As to the necessity of notice of dishonor in this case, it may be observed that the decision in Bickerdike *v.* Bollman has been much regretted. The court will not therefore feel inclined to extend it. The present case does not come within it. In Bickerdike *v.* Bollman, no possible detriment could arise to the drawer from the want of notice; but here much damage might result from it, for the drawer has in this case a remedy over against Lough & Co. Besides, although he knew that he had no effects in Gordon's hand, it does not appear that he knew that Lough & Co. had not; and if he had a reasonable expectation that the bill when presented would be paid, either from the funds of Lough & Co. or his own, it is sufficient to entitle him to notice of dishonor. It must be admitted that it is difficult, if not impossible, to distinguish this case from that of Walwyn *v.* St. Quintin; but that case requires further consideration.

Gurney and *Tindal*, in support of the rule. The cases of Orr. *v.* Maginnis and Thorpe *v.* Legge are not decisive upon the point for which they are cited. In those cases, special averments were introduced; but that does not show those special averments to have been necessary. In Lundie *v.* Robertson,[4] the declaration contained all the averments of presentment, &c.; and the plaintiff recovered, although no proof, except a subsequent promise to pay the bill, was given in evidence. Here notice was unnecessary; and the rule is, that where an allegation is unnecessary, it may be struck out, and needs not be

[1] 7 East, 359.
[2] 12 East, 171.
[3] Bayley on Bills, 187, ed. Barnes.
[4] 7 East, 231.

proved; and Boulager v. Talleyrand [1] is an authority expressly in point. As to the other point, where a drawer having no effects in the acceptor's hands draws upon him, he cannot have any reasonable expectation that the bill will be paid, and therefore it is useless to give him notice of it. This was decided in Bickerdike v. Bollman. The case of Walwyn v. St. Quintin is precisely in point, and is a stronger case than the present; for there the person in whose favor the bill of exchange was drawn had effects in the drawer's hands: here neither the defendants nor Lough & Co. had any effects in the hands of Gordon.

ABBOTT, C. J. I am of opinion that in this case the nonsuit was right. It has been held that the drawer of a bill who has no effects in the hands of the acceptor, and who has no right upon any other ground to expect that the bill will be paid, is not entitled to notice of its dishonor; and that for this reason, because the facts show that he must have known that the bill when presented would not be paid. That decision, which substituted knowledge for notice, I have always regretted, because it introduced nice distinctions into the law instead of adhering to a plain and intelligible rule. This case, however, is very different. The ground for the former decision was that, if notice had been given, there would still have been no person to be found upon whom the party to whom notice was omitted to be given might call for the money; but here at least one, and perhaps two persons, are in that situation. For the defendant might have called on Lough & Co. to pay the money; and I think, too, that he might have called upon the acceptor Gordon to do so. It is not necessary, however, to decide that question, because his having it undoubtedly in his power to call upon Lough & Co. is quite sufficient to distinguish this case from Bickerdike v. Bollman. There is, however, great difficulty in distinguishing it from Walwyn v. St. Quintin. But I must say that I cannot assent to the law there laid down; for, if notice had in that case been given to the drawer, he might have had his remedy over against a third person. As I have always thought that it would have been better never to have considered knowledge as equivalent to notice, I cannot consent to carry the law one step further. I think, therefore, that the present nonsuit was right.

BAYLEY, J. If the drawer could have been protected by want of notice in a case where the giving of such notice could have been of no use to him, it would have been contrary to the principles of law. The case of Bickerdike v. Bollman is, therefore, a right decision; but wherever the drawer can show that the want of notice may produce any detriment, the case will be very different. Where he has no effects

[1] 2 Esp. 550.

in the hands of the acceptor, that is *prima facie* evidence that he will not be injured by the want of notice; but that *prima facie* presumption may be rebutted; and, if the drawer can show actual prejudice, it takes it out of the case of Bickerdike *v.* Bollman. One test is this: suppose the drawer to pay the bill, has he any remedy over against a third person? In the case of Bickerdike *v.* Bollman, he had none; but here, if the defendant had paid the bill, he would clearly have had a remedy over against Lough & Co., because they impliedly undertook to indemnify him; and he would also, as it seems to me, have had a remedy over against the acceptor. The case of Walwyn *v.* St. Quintin is very similar to the present, and I am not sure that it can be distinguished from it. That case, however, is inconsistent with the decision in Brown *v.* Maffey.[1] In that case, all the parties to the bill previous to Wood were accommodation parties; yet there the defendant, who was one of them, was protected by want of notice, in consequence of such notice being held to be material to him with respect to his remedy over against Wood. That decides the present case. Besides, it may also be contended that the drawer in this case might fairly expect that Lough & Co. had funds in the drawer's hands; and, in that case, it would be very hard to hold that he might be called upon, without any previous notice, to pay the bill at any time within six years, and after all his transactions with Lough & Co. were at an end. On the other point, I am inclined to think that it is incumbent on the plaintiffs to allege in their declaration the want of effects, in order to excuse notice. If notice be averred to have been given, it seems to me it ought to be proved; and the proof of circumstances which excuse the giving of notice does not seem to me to be *ad idem* with such an averment. Possibly, however, it might be considered that such circumstances would be evidence of notice, inasmuch as they would be evidence that the party knew the bill would be dishonored. It is not necessary, however, to decide that question, as I am clearly of opinion that a notice in this case was requisite.

Holroyd, J. I am of the same opinion. The universal rule which prevailed until the decision of Bickerdike *v.* Bollman was that notice of dishonor must be given to the drawer within a reasonable time, in order that he might have recourse to such remedy, against any other person, as the law would give. In that case, however, the necessity of giving such notice was dispensed with, upon the ground that there no possible detriment could arise to the drawer from want of notice, which circumstance was adverted to by Buller, J., in his judgment. That case has been also considered as proceeding on the ground of fraud; and it is put upon that ground by Lord Alvanley, and by Heath

[1] 15 East, 216.

and Chambre, JJ., in Clegg v. Cotton,[1] which was subsequent to the decision of Walwyn v. St. Quintin. If a party has no effects in the drawee's hands, and has no reason to expect that the bill, when presented, will be paid, he is not to expect notice to be given. And, besides, his knowledge of the fact that the bill will be dishonored, is evidence from whence a jury might presume that he had notice. And, therefore, either upon the ground of fraud or of knowledge, the case of Bickerdike v. Bollman may be supported. But neither of those grounds applies here. For here the party who has only lent his name as a surety is guilty of no fraud, and the want of notice may be of the greatest importance to him, by preventing him from having recourse to the persons in favor of whom he drew the bill. It seems to me, therefore, that in this case the general rule of law ought to prevail. As to the other point, I think that where a person draws on his own account, and at the same time knows that the bill, when presented, will be dishonored, the general allegation of notice, as in this declaration, would be sufficient. It is not, however, necessary to decide that point in this case, inasmuch as it is quite clear that, upon the first point, our judgment must be for the defendant.

Rule discharged.[2]

CUNDY AND ANOTHER v. MARRIOTT.

IN THE KING'S BENCH, JANUARY 13, 1831.

[*Reported in* 1 *Barnewall & Adolphus*, 696.]

DECLARATION on a bill of exchange, bearing date the 16th of February, 1830, drawn by one Thomas Linch upon and accepted by T. G. Tyne, payable two months after date to the order of Linch, indorsed

[1] 3 B. & P. 242.

[2] *Ex parte* Heath, 2 V. & B. 240; Norton v. Pickering, 8 B. & C. 610; Sleigh v. Sleigh, 5 Ex. 514; Shirley v. Fellows, 9 Port. 300; Miser v. Trovinger, 7 Oh. St. 281, *accord*.

Walwyn v. St. Quintin, 1 B. & P. 652 (*overruled*); Shaw v. Stone, 1 Cush. 256 (*semble*), *contra*.

In *Ex parte* Heath, *supra*, Lord Eldon said (p. 241): "The courts were obliged necessarily to decide that, if bills were accepted for the accommodation of the drawer, and there was nothing but that paper between them, notice was not necessary, the drawer being, as between him and the acceptor, first liable; but if bills were drawn for the accommodation of the acceptor, the transaction being for his benefit, there must be notice without effects." — ED.

by Linch to the defendant, and by the latter to the plaintiff. Count for goods sold. Plea, general issue. At the trial before Lord Tenterden, C. J., at the London sittings after last term, the plaintiffs rested their claim to recover on the count for goods sold, and proved that goods to the amount of £65 had been purchased of them by the defendant. It appeared in the course of the cause that the defendant had indorsed to the plaintiffs the bill mentioned in the declaration in payment for the goods; and that the bill, when it became due, was dishonored by the acceptor, but no notice of such dishonor was given to the defendant. It was therefore contended that the plaintiffs had, by their laches, made the bill their own, and therefore that the defendant was thereby discharged. The bill was not drawn upon a proper stamp; and Lord Tenterden was of opinion that, being void for this reason, it could not be considered payment, and that under such circumstances notice of dishonor was unnecessary. He directed the jury to find for the plaintiffs, but reserved liberty to the defendant to move to enter a nonsuit.

Joshua Evans now moved accordingly. The plaintiffs were bound to use due diligence in presenting the bill, and to give notice to the indorser, even though they had considered it certain that the indorser, if he had had notice, could not have recovered the amount from the preceding parties. Nicholson *v.* Gouthit.[1] In Lafitte *v.* Slatter,[2] the drawer of a dishonored bill was held to be entitled to notice, although he knew the bill would not be paid by the acceptor, provided he had reason to expect it would be paid by any other person. Here the indorser might reasonably expect the bill would be paid by the drawer.

LORD TENTERDEN, C. J. It appeared that the plaintiffs had sold to the defendant goods of the value of £65, and in discharge of the debt the latter gave a piece of paper which was considered to be a bill of exchange. It turned out that a proper stamp was not affixed to this paper on which it was written. It was, therefore, worth nothing; and the want of notice, which has been relied upon, could make no difference. Consequently, the defendant did not prove payment.

LITTLEDALE, J. The plaintiffs were not bound to proceed on the bill of exchange. They abandoned it, and claimed to recover on the count for goods sold. The case in answer to that claim was, that a bill of exchange had been handed over by the defendant to the plaintiffs, and that they, by their conduct, had made this a payment, though the bill had, in fact, produced nothing. But the paper on which this bill was drawn had not a proper stamp affixed to it. It was worth

[1] 2 H. Bl. 609. [2] 6 Bing. 623.

nothing. The evidence, therefore, did not show a payment, but merely that a piece of paper was given by the defendant to the plaintiffs. *Rule refused.*[1]

TERRY AND OTHERS v. PARKER.

IN THE KING'S BENCH, MAY 5, 1837.

[*Reported in* 6 *Law Journal Reports, New Series*, 249.[2]]

ASSUMPSIT. The first count stated that the defendant, on the 16th of May, 1836, drew a bill of exchange upon one J. Twist, for £232 2*s.* 2*d.*, payable six months after date, which he indorsed to W. L. Kirkley, who indorsed it to the plaintiff. Averment: that the defendant had not, at the time, any effects in the hands of Twist, and had not any reasonable grounds to expect that Twist would have any effects, or that he or any other person would pay the bill when presented for payment; and that the defendant has not sustained any damage by reason of the said bill not having been presented for payment when due, or by reason of his not having had notice of presentment and dishonor, until the notice after mentioned; that after the bill became due it was presented to the said J. Twist for payment, but he refused to pay the amount; and that after the presentment the defendant had notice of the presentment and dishonor. The second count was on the same bill, but excused the want of due notice, on the ground that the date of the bill was written in so careless and negligent a manner that the date was mistaken for the 18th of May instead of the 16th, and the notice was given accordingly.

Pleas: to the first count, denying the indorsements; third, that one R. P. was liable to the defendant in a large sum of money; that there were accounts between P. and Twist, and that P. requested the defendant to draw upon Twist on account of his liability, and that thereupon he did draw upon him, and Twist accepted the bill on account of the said liability; that it was not presented when due, and that the defendant, by reason of the non-presentment for payment, and his not having had notice, is likely to lose the amount for which P. was liable. Verification: fourth, that the defendant had effects in the hands of

[1] Similarly, an indorsee who has purchased a void bill may recover his money from his indorser in an action for money had and received without making presentment or giving notice of the dishonor of the bill. Copp *v.* McDugall, 9 Mass. 1; Turnbull *v.* Bowyer, 40 N. Y. 456. See Chandler *v.* Mason, 2 Vt. 193. — ED.

[2] 6 A. & E. 502, s. c. — ED.

Twist when the bill was drawn; fifth, that there were accounts between the defendant and J. Twist; that Twist accepted for good consideration between him and defendant, and that the defendant fully expected the same to be paid. The first and second pleas to the second count denied the indorsements; the third and fourth traversed the negligence imputed.

Replications to the third pleas putting in issue all the averments therein.

The plaintiffs, at the last York assizes, before Alderson, B., having recovered a verdict upon all the issues,

Cresswell, on a former day in this term, moved for a rule to arrest the judgment, on the ground that it was admitted in the declaration that there was no presentment on the day when the bill became due, and that was necessary to charge the drawer. It is true that it has been settled by Bickerdike *v.* Bollman and Walwyn *v.* St. Quintin,[1] and many other cases, that there is no necessity to give notice of dishonor where the drawer has no effects in the hands of the acceptor; but there is no authority which has decided that it is not necessary to make a presentment of the bill for payment on the day when it falls due. In De Berdt *v.* Atkinson,[2] this point might have been urged; and therefore the decision of the court is so far against the plaintiff, but it was not, in fact, decided. As bankruptcy of the party is no excuse for the non-presentment, so also it should seem that even in this case the bill ought to be presented, that the drawer may have the benefit of the chance of its being paid by some one.

Cur. adv. vult.

Lord Denman, C. J., on this day said: The question in this case is whether want of effects in the hands of the drawee excuses the holder of a bill of exchange from the necessity of presenting the bill for payment, as well as of giving notice of dishonor to the drawer. Many cases establish that notice of dishonor need not be given to the drawer in such a case; and the reason assigned is, because he is in no respect prejudiced by want of such notice, having no remedy against any other party on the bill. This reason equally applies to want of presentment for payment, since, if the bill were presented and paid by the drawee, the drawer would become indebted to him in the amount, instead of being indebted to the holder of the bill, and would be in no way benefited by such presentment or payment. No case directly in point seems to have been decided. The case of De Berdt *v.* Atkinson was an action on a promissory note against the payee and indorser, who had lent his name, knowing that the maker was insolvent; and it

[1] 1 B. & P. 652. [2] 2 H. Bl. 336.

was held that he was not discharged by the note not having been presented till the day after it was due, and notice of dishonor not having been given for several days. But that case can hardly be supported, inasmuch as the defendant was not the party for whose accommodation the note was made; on the contrary, he lent his name to accommodate the maker. Neither is the case of Hopley v. Dufresne [1] an authority the other way, for, although that was a case of an acceptance for the accommodation of the defendant, Lord Ellenborough nonsuited the plaintiff because the bill was presented to the acceptor's bankers after banking hours; yet that nonsuit was set aside on the ground of there being no evidence of a subsequent waiver, and the point whether the drawer was entitled to object to the want of due presentment was not determined.

It appears to us that the same reason applies to want of presentment as to want of notice of dishonor, and therefore that the same rule ought to prevail with respect to want of effects operating as an excuse; and the rule to arrest judgment must be refused.

Rule refused.[2]

TURNER v. STONES.

In the Queen's Bench, Trinity Term, 1843.

[*Reported in* 1 *Dowling & Lowndes*, 122.]

Atherton obtained a rule, calling upon the plaintiff to show cause why the verdict of the jury in this action should not be set aside and a nonsuit entered, or a new trial had. It was an action of debt, and the declaration was in the ordinary form, with counts for money had and received, and on an account stated. Plea, never indebted. The cause was tried before the under-sheriff of Yorkshire, when it appeared in evidence that the plaintiff and defendant resided at Darlington. On Saturday the 14th of January, the defendant sent to the plaintiff a £5 bank-note of Messrs. Parker & Shore's Sheffield Bank, and requested to have change for it, and the plaintiff sent him change accordingly. On the morning of Monday, the 16th of January, Messrs.

[1] 15 East, 275.

[2] Wirth v. Austin, L. R. 10 C. P. 689; Shepherd v. Reddie (Court of Session), March 1, 1870; Olshausen v. Lewis, 1 Biss. 419; McRae v. Rhodes, 22 Ark. 315; Harrison v. Trader, 29 Ark. 85; Barbaroux v. Waters, 3 Met. (Ky.) 304; Kinsley v. Robinson, 21 Pick. 327; Dollfus v. Frosch, 1 Den. 367; Ross v. Bedell, 5 Duer, 462, *accord*.

English v. Wall, 12 Rob. (La.) 132; Cruger v. Armstrong, 3 Johns. Cas. 5 (*semble*), *contra* — Ed.

Parker & Shore's banking-house at Sheffield was opened for about two hours; but it appeared during that time no payments were made, and that about eleven o'clock in the morning a placard was exhibited, announcing that the bank had suspended payments. A fiat in bankruptcy subsequently issued against the partners in the bank. There was no evidence to show that the note in question had been presented for payment; but it appeared that the plaintiff, having become aware of the stoppage of the bank, sent the note back to the defendant on the 16th of January, requesting to be indemnified by the return of the amount of it in money; that the defendant first promised to accede to his request on the following Wednesday, but eventually refused to return the money, and thereupon the present action was brought. The jury returned a verdict for the plaintiff; they found also that the note had not been presented, but declared their opinion that, if the note had been presented, it would not have been paid. It was now submitted that, under the circumstances disclosed in evidence, the plaintiff was not entitled to recover, for that he was bound to present the note on the morning of the 16th of January, and that he was not discharged from the necessity of performing that duty, even by the known solvency of the bankers. Bowes and Others *v.* Howe [1] and Camidge *v.* Allenby were cited.

Martin subsequently showed cause.

Atherton, in support of the rule.[2]

COLERIDGE, J. This was an action for money had and received. The plea was, never indebted. A verdict passed for the plaintiff; and, on a motion for leave to enter a nonsuit, the material facts appeared to be the following: on Saturday the 14th of January, after banking hours, the defendant sent a £5 note of Parker & Shore's bank at Sheffield to the plaintiff, requesting change. The plaintiff sent him the amount in money. The bank never opened again for payments, and the partners became bankrupts. On Monday the 16th, in the morning, the stoppage being known to both parties, the plaintiff sent back the note to the defendant, and requested to have the change returned. After some vacillation, and even a promise to pay, this was ultimately refused. The only ground for the motion is, that the note had never been presented at the bank; and this, it is said, was the duty of the holder, from which he was not discharged by the known insolvency of the makers. The cases of Bowes and Others *v.* Howe [1] and Camidge *v.* Allenby were relied on by the defendant. The first was an action against bankers, the makers of a note payable at the Workington Bank: the declaration did not aver a presentment at the bank, but instead

[1] 5 Taunt. 30.

[2] The arguments of counsel have been omitted. — ED.

thereof alleged that the defendant "became insolvent, and then and from thenceforth until and at the time of exhibiting the bill ceased and wholly declined and refused to pay at the Workington Bank aforesaid." In the Exchequer Chamber, it was held that this allegation amounted to no more than a general allegation of insolvency; and as no request was alleged, to which the refusal was to be applied, the necessity for alleging a presentment was not dispensed with. There the action was against the makers, who by their contract had made themselves only liable to pay on demand at a particular place, and the mere fact of their insolvency did not disentitle them from insisting on such demand. The second case, Camidge v. Allenby, was between third parties. Goods bought were paid for in notes of a bank which had stopped payment at an earlier hour on the same day. Neither party was aware of this: the seller did not present them at the bank, nor till a week after require the buyer to receive them back again. If the judgment had proceeded upon the former of these two facts, the case might have been an authority for the defendant; but the delay of the plaintiff in giving notice to the defendant was thought to make it unnecessary to decide on that ground. No one of the judges lays it down as absolutely necessary, under the circumstances stated, to present the notes at the bank: they say that "the notes ought to have been presented within a reasonable time, or at least notice of the insolvency of the bankers should have been given to the defendant." And when it was cited in another case, Bayley, B., who had taken part in the decision, said that "the notes should be deemed a payment, unless returned in a reasonable time; and that the plaintiff, by keeping the notes a week after he had heard of the stoppage without notice to the defendant, had precluded himself from recovering." It is obvious that these cases do not establish the proposition for which the defendant contends; and in Rogers v. Langford [1] the point was still left without express decision. There the defendant, on the 28th of November, procured the plaintiff's servant to change for him some notes of a bank which stopped payment on the same day; on the 29th, the plaintiff was informed of the stoppage; on the 30th, he wrote to the defendant, and requested a return of the money; no answer was received to this, and on the 6th of December the notes were tendered to him; they were not presented at the bank for payment. The plaintiff sued on a warranty of the notes, adding the money counts, and first contended that in such a transaction there was an implied warranty that the notes were worth as much as they purported to represent, which the court denied; but on the money counts this case raised, as the case of Camidge v. Allenby had both the points of non-presentment

[1] 1 C. & M. 637.

and laches of the holder as to notice, the former was not expressly decided. Bayley, B., said, "The notes ought to have been either presented by the holder to the bank for payment, or else to have been returned without delay to the defendant, so as to have given him an opportunity of getting payment for them, or of making the best of them." I confess I feel a difficulty in seeing the relation to each other of these alternatives. Presentment at the bank should seem to be required on the principle that the bankers are primarily liable, and the former holders only secondarily on their default, which is not established till a demand on them according to the terms of the contract. But, if this be so, how is this affected by a prompt return of the note to the holder, and a demand from him at a time when, by the hypothesis, his secondary liability has not arisen. On the other hand, how can a presentment at the bank in due time dispense with the necessity of a prompt notice and return of the notes to the former holder, who may have the means of recovering the value from the person from whom he received them, and who certainly has a right to consider that the party who keeps the notes an unreasonable time in his possession has thereby decided to make them his own? But the case of Henderson *v.* Appleton, which is to be found cited in Rogers *v.* Langford, from Chitty on Bills, Addenda, p. 658, 7th ed., is an express authority that where a bank has stopped payment, and the notes had been promptly tendered back to the party from whom they were received, the want of presentment at the bank is no defence. That case was argued on a motion for a new trial from the Court of Pleas at Durham, before Bayley, J., and Hullock, B., and is of the more weight because it appears that Camidge *v.* Allenby was brought to the recollection of the former of those learned judges, and commented on by him, and because it was itself cited before him in Rogers *v.* Langford, and, as may be collected from the report, acquiesced in by him on that later occasion. Perhaps, therefore, it may be taken as an explanation of what he is reported to have said in those two cases, and at all events to represent his opinion on the question. This express authority certainly best promotes the ends of justice in this particular case, and will probably be found to do so in the generality of cases. Bankers' notes are so much more frequently received as cash, and in many respects so much more resemble cash, than ordinary negotiable mercantile paper, that it is scarcely possible to apply to them all the rules which regulate the liabilities of present and former holders *inter se*. Where, therefore, a presentment at the bank could not reasonably be expected to produce payment, I think the obligation on the holder is to give notice promptly to the party from whom he receives the note, and to tender him the note: this enables that party not merely to present at

the bank, but to have recourse to the former holder, if he himself shall have so dealt with the note while he held it as to have preserved any rights as against that holder. At all events, that party is not by the laches of the holder lulled into the belief that he has made the note his own, and will not insist upon recovering the value from him. Thinking, therefore, that the plaintiff has done in this case all that he was bound to do, I am of opinion that the rule ought to be discharged.

Rule discharged.[1]

ALLEN *v.* EDMUNDSON.

In the Exchequer, June 28, 1848.

[*Reported in* 2 *Exchequer Reports*, 719.]

Debt for goods sold, &c. Plea: that the defendant drew a bill of exchange, and indorsed it to the plaintiff on account of the debt; that the bill was dishonored; and "although the time for giving due notice of dishonor had elapsed before the commencement of the suit, and although such notice might have been given, yet the defendant had not at that time, nor at any time thereafter, had due notice of the dishonor of the bill." Replication, that the defendant had due notice, upon which issue was joined.

At the trial before Rolfe, B., at the Liverpool spring assizes, 1848, it appeared that both the plaintiff and defendant resided in Manchester. The bill was dishonored in London on Saturday the 2d of October, and was sent from London on the following Monday, and received by the plaintiff, in Manchester, on Tuesday the 5th of October. On the same day, the plaintiff sent it, during business hours, to the defendant's counting-house. The messenger found it shut up: he knocked at the door of the counting-house, and, no one answering, he came away. On the following day, he again went, and found nobody there but a boy, playing on the stairs, who said he was the son of the defendant, and that his father was in London. No notice was left

[1] Frontier Bank *v.* Morse, 22 Me. 88, *accord.*

See Henderson *v.* Appleton, Chitty. Bills (10th ed.), 246, n. 4; Robson *v.* Oliver, 10 Q. B. 704; Rogers *v.* Langford, 1 Cr. & M. 637.

Conf. Lovett *v.* Conwell, 6 Wend. 369.

Interest, of course, does not run upon a bill or note until default upon presentment for payment. Anonymous, *supra*, p. 1; Upton *v.* Ferrers, *supra*, p. 8. But interest accrues upon the notes of an insolvent bank from the moment it is shut up. *In re* East of England Banking Co., L. R. 6 Eq. 368; Atwood *v.* Bank of Chillicothe, 10 Oh. 526. But see *supra*, p. 8, n. 4. — Ed.

with this boy. On the Monday following, the plaintiff served the defendant with formal notice of dishonor, when he said it was too late. The boy, who was called as a witness for the defendant, said that his father went to London on the Tuesday, and returned on the following Monday, and that during his absence the witness remained in charge of the counting-house, and was constantly there during the hours of business. He also said that, if any notice had been left with him, he would have forwarded it to his father. The plaintiff's counsel relied upon Crosse v. Smith [1] as an authority to show that the knocking at the counting-house door on the Tuesday was, in point of law, notice of dishonor. The learned judge told the jury to find for the plaintiff if they believed that he sent to the defendant's place of business, during business hours, for the purpose of giving notice of dishonor, and the messenger knocked, and found no one there. The jury having found for the plaintiff, leave was reserved for the defendant to move to enter a nonsuit, if the court should be of opinion that there was no evidence of notice of dishonor.

A rule *nisi* having been obtained accordingly,

Atherton showed cause.

Martin, contra.[2]

PARKE, B. We are all agreed that the rule ought to be absolute to enter a nonsuit, but the plaintiff may have a new trial on payment of costs. The point for consideration is whether what occurred on the first day, on going to the defendant's counting-house, was, in point of law, due notice within the meaning of the allegation in the replication. On the authority of Crosse v. Smith,[1] my brother Rolfe thought it was; but we granted a rule in order to consider whether Crosse v. Smith went to that extent, and whether the allegation was satisfied by the proof. Since the case of Crosse v. Smith, there has been that of Solarte v. Palmer, a solemn decision of the House of Lords, which has been followed by many others, in which, though the strictness of the rule laid down in Solarte v. Palmer has been modified, particularly by this court, in Bailey v. Porter,[3] still a notice of dishonor requires a certain formal intimation that the bill has been duly presented and not paid, and that the party giving notice means to hold the other party liable. That latter requisite, according to subsequent cases, need not be positive and express, because it is implied from the fact of the bill being presented. Both Crosse v. Smith and the prior case of Goldsmith v. Bland were decided before the formalities necessary in giving notice of dishonor were settled and acted on; and in Crosse

[1] 1 M. & Sel. 545.

[2] The arguments of counsel have been omitted. — ED.

[3] 14 M. & W. 44.

v. Smith the pleadings were not such as to make it necessary for the court to distinguish between a dispensation of due notice and the giving of due notice. In that case, Lord Ellenborough laid down that the going to the counting-house during business hours, and finding no one there to receive the notice, was equivalent to a dispensation of notice, since, according to the usage of trade, a merchant who puts his name to a bill ought to be ready at his place of business to receive notice of the bill's dishonor. In fact, he engages that he will, by himself or his servant, be there; and it is enough for the party who has to give intimation of dishonor to go to that place, and be ready to deliver it. If the merchant be not there, it is his own fault: the holder has done all that is required, and the not having found any party at the place of business to receive the notice is equivalent to a dispensation of it.[1] Therefore, there is no doubt of the propriety of the decision of Crosse v. Smith. But I cannot accede to that case so far as to make the act of going and knocking at the door equivalent to actual notice. If the plaintiff had sent a written notice by post, or had left it by putting it through the door, that would have been an intimation of dishonor, in proper course to be received by the party; or if the plaintiff found a person there and delivered a verbal notice, that would have been enough. But, if he does neither, it is insufficient, unless the facts amount to a dispensation of notice. In the present case, the allegation in the replication is not proved, and there has been no intimation of dishonor to satisfy the issue. That allegation means that the plaintiff has given intimation of the bill's dishonor in the way in which he ought to do, according to the usual custom of trade. Now, though there has been a dispensation of notice, the plaintiff does not rely on that, but takes issue on the fact of notice. It is unnecessary to consider whether the plaintiff might not have treated the absence of the party, not as a dispensation from giving any notice, but merely as an excuse for not delivering it on that day, — for he was not bound to go more than once, — and whether, if he had gone the day after and delivered it, that would have been enough; for that point was not taken at the trial, and our attention is confined to what was done on the first day. Perhaps, if the plaintiff had gone the day after he saw the boy, and delivered a written notice, it would have been a question for the jury whether he ought not to have left a

[1] Goldsmith v. Bland, Chitty, Bills (10th ed.), 319; Crosse v. Smith, 1 M. & S. 545, Williams v. Bank of U. S., 2 Pet. 96; Stephenson v. Primrose, 8 Port. 155 (*semble*), *contra*.

If neither the place of business nor residence of an indorser can be found after diligent inquiry, notice is excused. Tunstall v. Walker, 10 Miss. 688; Smith v. Fisher, 24 Pa. 222 (*semble*). See *supra*, p. 408, note 8. — Ed.

notice the day before, when he found a person at the counting-house to receive messages. That would depend upon whether the person was a mere boy or a clerk who kept the books. If he chose to consider the absence of the party from his counting-house as an excuse for delaying the notice, he might treat the notice on Monday as due notice, provided he had no immediate opportunity of serving a better notice. That would again leave the question open, whether, when he saw the boy, he might not have delivered a better notice. But if he chooses to rely on the attempt on the first day as an excuse for notice altogether, the pleadings ought so to have stated it. The rule will therefore be absolute for a new trial, on payment of costs of the trial within a week, the plaintiff to be at liberty to amend his replication on payment of the costs of the amendment. Otherwise, a nonsuit to be entered.

Alderson, B. Solarte *v.* Palmer decided this question also, when it decided that a notice of dishonor required a statement of particular matters. It is impossible to say that the knocking at a door is a statement of one thing more than another. The circumstances must, therefore, amount to a dispensation of notice, and ought to have been pleaded as such.

Rolfe, B. Since the case of Solarte *v.* Palmer, the expression "notice of dishonor" means something beyond mere notice: there must be a demand also. It is clear that knocking at a door cannot be a demand.

Platt, B., concurred. *Rule absolute accordingly.*

CAUNT *v.* THOMPSON.

In the Common Pleas, February 14, 1849.

[*Reported in 7 Common Bench Reports,* 400.]

Cresswell, J., delivered the judgment of the court.[1]

This was an action of assumpsit by the indorsee against the drawer of a bill of exchange.

The declaration alleged that the bill was drawn by the defendant on J. Whitley, payable to the order of the drawer two months after date; that the bill was accepted by Whitley, and indorsed by the drawer to Tomlin, and by Tomlin to the plaintiff; and that the bill when due was presented to Whitley, and dishonored, of which the defendant had notice.

[1] All that is material to an understanding of the case being contained in this judgment, the rest of the case has been omitted. — Ed.

The defendant pleaded, first, that the bill was not duly presented to Whitley; secondly, that the defendant had no notice of the dishonor of the bill.

At the trial before Wilde, C. J., at the sittings in Middlesex after Michaelmas term, 1847, it appeared in evidence that before the bill became due the acceptor died, having made the defendant (the drawer) his executor, and that he had proved the will; that, when the bill became due, the plaintiff sent one of the witnesses to the house of the acceptor to present the bill; that the witness there saw the defendant, to whom he presented the bill, saying, "I have brought a bill from Caunt's: you know what it is;" and that thereupon the defendant said: "I am executor of Whitley: you must persuade Caunt to let the bill stand over a few days, because Whitley has only been dead a few days. I shall see the bill paid."

Upon this evidence, the plaintiff applied for leave to amend his declaration, by averring the death of the acceptor, the appointment of the defendant as his executor, and the presentment of the bill to him.

The Lord Chief Justice allowed the amendment to be made, and said that the proof of presentment to the executor was not sufficient proof of notice of dishonor.

A verdict was thereupon taken for the plaintiff on the first issue, and for the defendant on the second; leave being reserved to the plaintiff to move to enter a verdict on that issue in his favor, or for judgment *non obstante veredicto;* and leave being likewise reserved to the defendant to move on the ground that the amendment ought not to have been made.

Cross rules were accordingly obtained in Hilary term, 1848.

At the argument, we disposed of the defendant's rule, thinking the amendment properly allowed; and now, after consideration, we think that the plaintiff's rule, to enter a verdict in his favor on the second issue, must be made absolute.

It may be assumed to be a settled rule, that knowledge of the probability, however strong, that a bill of exchange will be dishonored, cannot operate as a notice of dishonor, or dispense with it. Pothier, Contrat de Change, Part I. c. 5, § 147,[1] lays down the same rule with reference to foreign[2] bills; viz., that the notorious insolvency of the acceptor of a bill does not dispense with protest for non-payment, and notice to the prior parties, because the insolvency of the acceptor, however notorious, may not be known to them, or, in the absence of notice, they may suppose that the acceptor, though insolvent, has

[1] Citing Savary, parer. 45.

[2] "Foreign," as opposed to "English," not as opposed to "inland."

found means to take up the bill. So also it may be considered as settled that information that a bill has been dishonored, derived from a person not having authority to give it, does not supply the place of notice. Hence it has become usual to say that knowledge of the dishonor of a bill is not equivalent to notice. In such cases as those above mentioned, it certainly is not.

The law has not been so well settled as to the nature of the notice to be given. In Hartley *v.* Case,[1] Abbott, C. J., said, "There is no precise form of words necessary to be used in giving notice of the dishonor of a bill of exchange; but the language used must be such as to convey notice to the party what the bill is, and that payment of it has been refused by the acceptor." Since that case was decided, there has been some fluctuation of opinion on the subject. In Solarte *v.* Palmer, which was finally decided in the House of Lords, a very strict rule was adopted; but that has not been adhered to. In Burgh *v.* Legge,[2] Parke, B., says, "There must be proof of a notice given from some party entitled to call for payment of this bill, and conveying in its terms intelligence of the presentment, dishonor, and parties to be held liable in consequence." But, in Furze *v.* Sharwood[3] and King *v.* Bickley, it was decided that the notice need not, in terms, inform the party to whom it is given that he is looked to for payment; and in Miers *v.* Brown[4] these latter decisions were followed.

The rule does not differ in substance from that given by Ashhurst, J., in Tindal *v.* Brown:[5] "Notice means something more than knowledge, because it is competent to the holder to give credit to the maker.[7] It is not enough to say that the maker does not intend to pay, but that he, the holder, does not intend to give credit." In substance, these cases seem to establish that, in order to make a prior holder responsible, he must derive from some person entitled to call for payment information that the bill has been dishonored, and that the party is in a condition to sue him, from which he may infer that he will be held responsible. In Miers *v.* Brown, Alderson, B., describes what is needful in these terms: "Knowledge of the dishonor obtained from a communication by the holder of the bill amounts to notice."

In the present case, the defendant knew that the bill was dishonored, and he knew it from the best source, namely, his own personal act in dishonoring it when presented by the holder; and he knew from the same source that time had not been given to the acceptor. He had, therefore, all the information which, according to Ashhurst, J., the

[1] 4 B. & C. 339. [2] 5 M. & W. 418. [3] 2 Q. B. 888.
[4] 11 M. & W. 372. [5] 1 T. R. 167.

notice ought to convey; and, knowing that, he would know also that the holder had placed himself in a situation to call upon him (the drawer) for payment, from which — to adopt the view of modern decisions — he might infer that he would be called upon. This is very different from that knowledge which has been spoken of as not equivalent to notice, and is at least as much notice as the knowledge spoken of by Alderson, B., in Miers *v.* Brown. Indeed, there would be some absurdity in requiring that the plaintiff should have stated to the defendant at the time when he dishonored the bill, "Take notice that this bill has been dishonored by you." Lord Ellenborough seems to have been of that opinion in the case of Porthouse *v.* Parker, an action by the payee against the drawer of a bill. It was drawn by one Wood as agent of George James and John Parker, upon John Parker. There was no proof that Wood had authority to draw; but, evidence being given that the bill was accepted by a duly authorized agent for John Parker, Lord Ellenborough held that it was evidence of the bill having been regularly drawn; and, that the acceptor being likewise a drawer, there would be no occasion for the plaintiff to prove that the defendants had received express notice of the dishonor of the bill, as this must necessarily have been known to one of them; and the knowledge of one was the knowledge of all.

Upon the authority of that case, and upon principle, we think that the notice to the defendant in this case was established, and that the verdict should be entered for the plaintiff on the issue on the second plea.

Plaintiff's rule absolute.
Defendant's rule discharged.

SANDS AND OTHERS *v.* CLARKE.

IN THE COMMON PLEAS, DECEMBER 10, 1849.

[*Reported in* 8 *Common Bench Reports*, 751.]

MAULE, J.,[1] delivered the judgment of the court.[2]

This case came before the court upon a demurrer to the declaration, and was argued before the Lord Chief Justice, my brother Cresswell, and myself; and the judgment which I am about to read was prepared by the Lord Chief Justice.

[1] The argument had taken place before Wilde, C. J., Coltman and Cresswell, JJ.

[2] All that is material to an understanding of the case being contained in this judgment, the rest of the case has been omitted. — ED.

The declaration contains two counts upon promissory notes. The notes are alike in form, and differ only in amount; and the action is against the maker of the notes, by the payees. In each note, the defendant promised to pay the sum therein mentioned, at the respective dates, at No. 11 Old Slip; the period for which the notes were drawn being averred to have expired before the commencement of the action.

Neither of the counts contains any averment of presentment at No. 11 Old Slip, the place where both notes were made payable; but, by way of excuse for the non-presentment, or of dispensation of the duty of presentment, it is averred in both counts that, when the promissory notes therein respectively mentioned became due, the plaintiffs were ready and willing to present the said notes to the defendant at the said No. 11 Old Slip for payment, and then and there to demand of the defendant payment of the said notes, and the plaintiffs would have presented the said notes, and demanded payment thereof accordingly, but the defendant was then absent from and not to be found at the said No. 11 Old Slip, and had then clandestinely departed and absconded from thence, without leaving or having left any effects at the said place, or any means or provision there for the payment of the said notes, nor were there any effects of the defendant at the said No. 11 Old Slip, or any means or provision there for the payment of the said notes, and the said defendant did not pay the said notes when they became due.

To this declaration the defendant has specially demurred, assigning for cause that it does not appear in the said counts, or either of them, that the said notes, or either of them, were or was presented at No. 11 Old Slip, nor does it appear that the defendant excused or prevented the plaintiffs from presenting the said notes, or either of them, at the said place; and the contract of the defendant contained in each of the said notes being to pay if presented at the said place, and there being no presentment at the said place, no breach of contract by the defendant appears in the said first and second counts, or either of them.

The demurrer came on for argument in Easter term; and, upon the argument, the counsel upon behalf of the defendant relied upon the special causes of demurrer assigned, and contended that it was settled law that a note made payable, in the body of it, at some specified place, must be presented when due at that place; and that the declaration must aver the presentment to have been made, or set forth some acts on the part of the maker to excuse the want of presentment; and that the matter set forth in this declaration did not furnish any such legal excuse or dispensation; and the case of

Bowes v. Howe[1] was cited as a distinct authority governing the present case.

Upon the part of the plaintiff, it was contended that the facts set forth by way of excuse for the non-presentment of the notes were sufficient in point of law, because they showed that the presentment, under the circumstances stated, would have been unavailing and useless, and that, by law, conditions to do useless acts were not required to be performed; and Mayne's Case[2] was cited as an authority. The plaintiff's counsel also contended that the several cases upon bills of exchange and promissory notes, in which it had been determined that presentment need not be made, or notice given of the dishonor, where no damage could be sustained by the omission, were authorities applicable to the present case.

But the court is of opinion that the authorities referred to on the part of the plaintiff do not govern this case, and that the matter set forth in the declaration, by way of excuse for the non-presentment, is not sufficient; and that the declaration does not therefore show any breach of the promise contained in the notes.

It is clear that the presentment of the notes at No. 11 Old Slip is, by the notes, made a condition precedent to the defendant's liability to pay; and equally clear that it must be performed before he can be charged, unless the defendant has himself discharged the condition or dispensed with its performance.

The case of Bowes v. Howe is a strong authority for the defendant. That was an action against the makers of certain promissory notes, by which they had promised to pay £5 at Workington Bank; and, in order to excuse the non-presentment, the declaration averred that, after the making of the note and before the exhibiting of the bill, the defendant had become insolvent, and then, and from thenceforth, until and at the time of the exhibiting of the bill, ceased, and wholly declined and refused, to pay at Workington Bank aforesaid the sum or sums of money specified in the notes. The declaration concluded with the general breach, that the defendants had not paid, although requested. The court of error held that the matter set forth in the declaration did not dispense with the presentment of the notes; and Macdonald, C. B., who pronounced the judgment, remarked that the alleged declaration by the defendants that they would pay none of their notes was not made to the plaintiffs, but merely that the defendants had declared generally that they neither could nor would pay any of their notes. This case is a decisive authority to the effect that a declaration of insolvency by the maker of a note, or a general

[1] 5 Taunt. 30. [2] 5 Co. Rep. 21, a.

declaration by him that he will not pay any of his notes, will not dispense with the presentment.

The declaration in that case went further than the present, which states that the defendant had absconded when the notes became due, which absconding might have taken place even before the giving of the notes; nor does it appear that No. 11 Old Slip was a place shut up, at which, therefore, no demand could be made or information obtained respecting the defendant. The defendant was not bound to have the money at the Old Slip before the note was presented. It is decided that the known bankruptcy of the maker of a note payable at a particular place will not dispense with the presentment, although in such a case there can be no presumption that the maker possesses the means of payment; and the averment in this declaration states no circumstances which prevented the presentment being made, but simply such as are calculated to create a strong suspicion that the note would not have been paid, which is not enough.

The case of De Berdt *v.* Atkinson[1] was cited on behalf of the plaintiff. That was an action by the indorsee of a promissory note against the payee and indorser. The defence was, that the note had not been presented to the maker: the court held that, because the defendant, the payee of the note, had given no value to the maker, it was unnecessary that the note should be presented to the maker; and the case was considered as analogous to that of the drawer of an accommodation bill, and in such cases the law-merchant has been held to dispense with presentment and notice of dishonor. But the principle of those decisions has no application to a case like the present, in which presentment of the note, or a dispensation with the presentment by the maker of the note, is clearly necessary. That case, however, has been dissented from, if not distinctly overruled. See the remarks of Chambre, J., in Leach *v.* Hewitt, Brown *v.* Maffey,[2] and Cory *v.* Scott.

The case of Turner *v.* Stones was also cited by the plaintiffs' counsel. The action was for money had and received, and the plaintiff sought to recover a sum of £5, which he had given to the defendant in exchange for a country bank-note, on Saturday the 14th of January. The bankers made no payments after that day, and subsequently became bankrupts. On Monday the 16th of January, the plaintiff returned the note to defendant, who promised to return the money on the Wednesday, but did not, but objected that the note had not been presented at Sheffield. The parties lived at Darlington, a great distance from Sheffield; and the bankers had opened their

[1] 2 H. Black. 336. [2] 15 East, 216

shop on the Monday for two hours, but made no payments, and, after the two hours, exhibited a placard, announcing that the bank had stopped payment. Coleridge, J., distinctly recognized the authority of Bowes v. Howe, and treated the question — whether, as between third persons, the presentment to the maker might be dispensed with, under certain circumstances — as a distinct question from that of the necessity of presentment, as against the maker of the note. That case is therefore no authority applicable to the present.

The case of Terry v. Parker, also cited, was a question whether the averment in the declaration, that the bill was accepted for the accommodation of the defendant (the drawer), and that he had no reason to expect that the bill would be paid, nor had sustained any damage by the non-presentment of the bill to the acceptor, was a sufficient excuse for the non-presentment to the acceptor, and the omission of notice to the defendant. The declaration was held sufficient, for the reason before stated; but that case is inapplicable to the present.

Burgh v. Legge [1] was also cited; but that case is also inapplicable to this case; the only question being, whether the averment of notice to the defendant, who was sued as indorser of the bills upon which the action was brought, was proved by the evidence of conversations between the plaintiff and the defendant before the bills became due, in which the defendant told the plaintiff that the bills would not be paid, and requested that he might not be put to the expense of postage to give him notice of the non-payment. The court held that the evidence was not sufficient, and a nonsuit was entered.

In addition to the several cases upon bills of exchange and promissory notes which have been referred to, the plaintiffs' counsel also cited Mayne's Case [2] as an authority to prove that useless conditions are not required to be performed; and it was argued that the facts alleged in the declaration showed that the presentment of the notes would have been a useless act, and ought to be held to dispense with the necessity of presentment. The facts of Mayne's Case exclude the application of the doctrine for which it was cited, to the present case. Mayne leased to Scott for twenty-one years, and covenanted that at any time during the life of Scott, upon surrender of his lease, Mayne would grant a new lease for Scott's life,[3] and gave bond to perform the covenants; and, in an action upon the bond, Mayne pleaded that Scott had not surrendered the lease; to which Scott replied that Mayne had granted the land to another person for eighty years; upon

[1] 5 M. & W. 418.

[2] 5 Co. Rep. 25, a. See Luxmore v. Robson, 1 B. & A. 584; Beswick v. Swindells, 3 N. & M. 159; 2 M. & G. 746, n. (*b*).

[3] "*Novel lease* (not for Scott's life, but) *durant le residue des ans.*"

which Mayne demurred; and it was held that Mayne had broken his covenant, without any surrender made, inasmuch as he had disabled himself to take the surrender, and to grant the new lease, and therefore it would have been useless for Scott to execute a deed in the form of a surrender, which would have been wholly inoperative; and so, no doubt, the law is, that, if a man binds himself to do certain acts, which he afterwards renders himself unable to perform, he thereby dispenses with the performance of conditions precedent to the act which he has so rendered himself unable to perform.

In this case, the defendant did no act tending to prevent or impede the presentment being duly made; and the court is of opinion that the declaration is defective, and fails to show a cause of action, by reason of the note not having been presented according to its exigency, and no sufficient legal excuse being shown for the omission. There must, therefore, be judgment for the defendant.

Judgment for the defendant.[1]

CAREW v. DUCKWORTH.

In the Exchequer, June 21, 1869.

[*Reported in Law Reports, 4 Exchequer, 313.*]

Declaration by plaintiff as holder of the defendant's check on the Agra Bank, Limited, for £30, averring due presentment and non-payment, and excusing notice of dishonor on the ground that the bank "had not in their hands sufficient or any effects of the defendant for payment of the said check or order, nor had they received any consideration for the payment by them of the said check or order, nor had the defendant at any time any reasonable ground to expect that the said Agra Bank, Limited, would pay the said check or order, nor has the defendant sustained any damage by reason of not having notice of the non-payment by the said Agra Bank, Limited, of the said check or order."

The 14th plea traversed the averments in the declaration excusing notice. Issue.

The cause was tried before Pigott, B., at the Middlesex sittings in Trinity term. It was proved that the check was given after banking hours on the 25th of February, and it was then agreed that it should not be presented for several days. The defendant then had £106 in

[1] Bowes v. Howe, 5 Taunt. 30, *accord.* — Ed.

the bank. The check was presented on the 10th of March, and dishonored.

On the morning of March 2, the balance in the defendant's favor was £18 17*s.* 2*d.*; in the course of the day, £48 6*s.* 8*d.* was paid in, and £58 5*s.* 2*d.* was drawn out, leaving a balance of £8 18*s.* 8*d.*; and from that day to the 10th of March, the largest sum in the bank to the defendant's credit was £9 8*s.* 4*d.* On the 10th, £107 was paid in, and £99 drawn out, which left to the defendant's credit a balance of £1 15*s.* 11*d.*

It was also proved that the defendant had on a former occasion overdrawn his account, and that the bank had thereupon given him notice they would not honor overdrafts.

The jury found all the averments of the declaration in favor of the plaintiff. A verdict was entered for the plaintiff, with leave to the defendant to move to enter a verdict for him. A rule having been obtained accordingly, and for a new trial, on the ground that the verdict was against evidence,

Francis, for the plaintiff, showed cause. First, the check was presented within a reasonable time, its presentment having been deferred at the request of the defendant. It was a question for the jury, and they have found in favor of the plaintiff. Had the defendant, then, either funds at the bank to meet the check, or any reasonable ground for expecting that it would be paid? It is certain that if the drawer has neither, he is not entitled to notice of dishonor, Legge *v.* Thorpe,[1] except where he has a remedy over against some third person of which want of notice may deprive him, as in Cory *v.* Scott, where the bill was drawn for the accommodation of the first indorsee. The reason of the rule requiring notice of dishonor, viz. the utility of notice, was clearly laid down in the judgments in Cory *v.* Scott, and the principles there laid down show that notice was here unnecessary. The cases of Hammond *v.* Dufrene and Blackhan *v.* Doren, where notice was held necessary, are entirely in harmony with this rule: in the former case, it was shown that before the bill became due the acceptor had in his hands a sum sufficient to meet the bill, and Lord Ellenborough's observations were made in answer to the contention that the mere fact that there were no assets in the acceptor's hands at the time of drawing the bill excused notice; in the latter case, there was a fluctuating balance, and the assets were insufficient only because of an uncommunicated act of appropriation by the drawees. But in the present case, from the 2d to the 10th of March there was neither at the beginning nor at the end of any day sufficient to meet the check, and there was no reason to suppose that the bank would have paid an

[1] 2 Camp. 310.

overdraft The defendant's contention must be that, if there be any effects at all, the drawer is entitled to notice; but the reason of the rule is against this view, for if there are neither sufficient effects in fact, nor any reasonable ground for the drawer to think the bill will be met, he cannot be injured by want of notice. The plaintiff's contention is in accordance with the rule laid down as to checks by Lord Denman, C. J., and Patteson, J., in Robinson *v.* Hawksford: the drawer of a check appropriates the sum to the payment of the check, and has no right afterwards to divert it to other uses.

J. Sharpe (*Parry*, Serjt., with him), for the defendant, supported the rule. The general rule requires notice of dishonor; and the rule is the same for checks as for bills. Kemble *v.* Mills.[1] Till Bickerdike *v.* Bollman, so far as the decisions of the courts went, this rule was without exception; and the exception then introduced has been regretted as creating uncertainty and irregularity in the law and in habits of business. See *per* Lord Ellenborough in Orr *v.* Maginnis[2] and Blackhan *v.* Doren, and Lord Tenterden in Cory *v.* Scott. But the exception has been rigorously limited; and Orr *v.* Maginnis[3] and Dennis *v.* Morrice are clear decisions that nothing will excuse want of notice, if there are funds of the drawer in the hands of the drawee at the time the bill is drawn. Now here, as in Blackhan *v.* Doren, a fluctuating balance existed in the hands of the bankers during the whole time. The expressions of Lord Ellenborough in Thackray *v.* Blackett are exactly applicable to the present case: "If there was an open account between the parties, and the acceptors were indebted in any sum to the drawer before the bills became due, I cannot say that he must necessarily have been aware beforehand that either of them would be dishonored." That case, moreover, resembles the present in the circumstance that there were there two bills, one of which might have been met, but both could not: so here, if other drafts had not been paid, this check might have been honored. The hardship of a decision for the plaintiff is shown by cases where (as is the practice with the Bank of England) a check is invariably refused if it exceeds by 6*d.* the amount of assets.

BRAMWELL, B. I cannot think that the law on this point is in a very satisfactory condition. The true rule should be, that no notice of dishonor is required where it would convey no information, that is, when the party sued knew beforehand that the bill would not be paid; but that, where he did not know, it is right that he should be informed of the non-payment. If this rule should be adopted, the question would be, Did he, practically speaking, know beforehand that the bill

[1] 1 M. & G. 757, 761, 767.
[2] 7 East, at p. 362.
[3] 7 East, 359.

would not be honored? This may depend on a variety of circumstances: he might think that the check would be honored by favor, though, in fact, there were no assets to meet it. But though this ought to be the rule, at all events in the case of checks (and I am not sure that it is not the rule in fact), yet it is not always to be found laid down in these terms, and perhaps it could not be established without doing violence to some of the cases.

The first question, then, is, Had the defendant funds in the hands of the bank to meet this check? which here becomes the question, whether there was evidence from which the jury could find this fact in the negative. The defendant had the sum of £106 in the bank at the time when he drew the check; but the question of his right to notice of dishonor must be considered in connection with his request that the check should not be presented for several days. Now the important question is, whether the drawer thinks that there will be funds to meet the draft, whether bill or check, when it is presented for payment. If I, in London, draw on a bank in York, where I have £1,000, which I know will be drawn out to-day, while the check cannot be presented till to-morrow, it is idle to say that, knowing there will be no funds there at any time when the check can be presented, I am entitled to notice of dishonor. The question, therefore, is, What was the state of the funds at the time when the bill ought in regular course to have been presented? Then the question arises, What is the meaning of several days or a few days? The jury may well have thought that it at least postponed the presentment till the 2d of March. Now from the 2d of March till the 10th, when the check was actually presented, there was not at any time a greater sum than £9 8*s.* 4*d.* available for its payment. There was evidence in the accounts to show that the defendant paid in money to his account, but he at once drew out as much as he paid in, or the money was so paid in and dealt with that it was not applicable to the payment of this check. This was evidence on which the jury might find that the defendant had not, in fact, funds in the bank at the time when the bill was presented.

But Mr. Sharpe says, that, if there were any funds, the defendant was entitled to notice of dishonor. This cannot be so: the question must be whether, practically, there were funds to such an amount as that at the time of drawing he could reasonably expect payment? For, though the expression "any funds" is used in some cases, it is preposterous to suppose that, because there was an old balance of 5*s.* to the credit of a customer, he would therefore be entitled to notice of dishonor of a check for £5,000. The question then must be, whether there were any such funds as the drawer might reasonably

and properly draw against, with an expectation that the draft would be honored. We may read the allegation in the declaration that the defendant had not sufficient, nor any, funds for the payment of the check, as meaning that he had no funds adequate for its payment, no funds against which he was entitled to draw the check in question. Therefore, as to this first question, I think there was evidence for the jury that there were no such funds in hand, from the time when the defendant would expect the check to be presented up to the time when it was presented in fact, as to give him ground to suppose that the check would be honored; and I think that this fact was rightly so found. Secondly, it is quite plain that there was evidence for the jury that the defendant had no reason to expect that the check would be honored; and I also think that they were right in so finding. There were eight entire days after the time when the defendant might first expect the check to be presented, on none of which had he any reason to expect that it would be paid, for he had no right to expect that any check would be paid which he had not sufficient effects to meet.

CHANNELL, B. I am of the same opinion. There is no ground for saying either that the verdict was against evidence, or that there was no evidence to go to the jury in support of the declaration. The evidence was that the check was not to be presented for a few days; the jury have found that when it was presented a reasonable time had elapsed, and I think they were warranted in so finding. There had been then eight days during which there were no funds in the hands of the bank to meet the check. There is, therefore, no ground to contend that the defendant had a reasonable expectation of the check being paid; and the case bears no resemblance to cases where funds might be expected to come in, — as, for instance, in the case of a landlord whose tenants were accustomed to pay their rents into the bank, and who had therefore a right to expect there would be assets to meet his draft, and might perhaps, for want of notice, lose his opportunity of recovering rent by distress.

CLEASBY, B. I am also of the same opinion. The issue is distinct, and involves the question whether the defendant had reasonable ground for expecting that the check would be paid. That this is a material question, appears from Kemble v. Mills,[1] where the declaration being objected to, Tindal, C. J., says, "I suppose the objection is, that it is not stated that the defendant had no reason to expect that the bill would be paid." This shows (though the declaration was in that case held sufficient) that the allegation of want of reasonable ground for the expectation of payment is an important and a neces-

[1] 1 M. & G. 757, 761.

sary averment, and is, therefore, an essential matter for consideration. The existence of such reasonable ground must obviously be a question for the jury. Now, here the check was given with a request that it should not be presented for a few days; but it is nevertheless said that, if at the time of drawing it there were funds, the drawer is entitled to notice of dishonor. But can it be said that after a check has been given with such a request, and its drawer next day draws out the whole of his funds, and never afterwards pays in a farthing, nor has any reasonable expectation of funds coming in, so that he must well know that there never can be any funds to meet the check, he is not completely aware that the check will not be paid in fact? Then put the case of a small sum being paid in, quite insufficient to satisfy the check, the question will still be, Was there any reasonable expectation that there would be funds to meet the check? The jury have found that the defendant had no reasonable expectation that the check would be paid, and I think there was sufficient ground for that finding.

BRAMWELL, B. I wish to add that, if there were funds in the hands of the bank sufficient to meet the check, the drawer would be entitled to notice, though he knew that the bank would not honor the check; for he would be entitled to say they were bound to honor it, even though they had told him they would not.

Rule discharged.[1]

TURNER v. SAMSON AND OTHERS.

IN THE COURT OF APPEAL, NOVEMBER 13, 1877.

[*Reported in* 2 *Queen's Bench Division*, 28.]

ACTION by C. Turner against M. Samson, M. Crichton, W. Horne, and F. Martinez. The plaintiff claimed £250 and interest due to him as the holder of a bill of exchange for £250 at four months drawn by Horne on, and accepted by, Samson, and indorsed by Horne, Martinez, and R. Sherwood.

The defendant Martinez by his statement of defence pleaded to the effect that the bill as between all the parties was an accommodation bill, drawn, accepted, and indorsed for the purpose of enabling Sherwood to raise money on it; that Sherwood had promised to meet the

[1] Hopkirk v. Page, 2 Brock. 20; *In re* Brown, 2 Story, 502, 520, *accord.*
Hill v. Norris, 2 St. & P. 114, *contra.*
See Lacoste v. Harper, 3 La. An. 385. — ED.

bill, but had failed to do so; and that the defendant Martinez had not received at any time any notice of the dishonor of the bill.

Demurrer. On the ground that, as it appeared by the statement of defence that the bill of exchange was an accommodation bill between all the parties, none of them were entitled to notice of dishonor.

On the demurrer coming on for argument before the Queen's Bench Division, the defendant did not appear, and judgment was entered for the plaintiff.

The defendant Martinez appealed.

Cooper Wyld (with him *E. C. Willis*), for the defendant. Martinez, as indorser, is entitled to notice of dishonor; and the fact that it is an accommodation bill is no excuse. Chitty on Bills, p. 305, 10th ed.

Philbrick, Q. C., and *Petheram*, for the plaintiff. The acceptor of a bill is not entitled to notice: the drawer is; but, if the bill is an accommodation bill, the drawer is not entitled to notice, as he has no right to expect the acceptor to meet the bill; and all parties to an accommodation bill are in the position of drawers. The reason for requiring notice is that the drawer may have effects in the hands of the acceptor which he may wish to withdraw, also that he may have a remedy over. Bickerdike *v.* Bollman. But these reasons do not apply to an accommodation bill. None of the parties had any right to expect that any one but Sherwood would meet the bill, and he was not the acceptor. In Carter *v.* Flower,[1] if there had been a sufficient allegation of no consideration, the demurrer would have been overruled.

MELLISH, L. J. The question in this case is whether there was a valid excuse for not giving notice of dishonor of a bill. It appears beyond doubt that the bill was an accommodation bill, and that the drawer and the other defendants as indorsers all signed the bill for the accommodation of Sherwood. The question is in substance whether the defendant, the appellant, was entitled to notice. He was plainly not the person who was to take up the bill, and he had a right to suppose that another person would see that it was taken up. It appears to me that the defendant was in the same position as if the acceptor had been the person who was ultimately liable to pay.

BRETT, J. A. This is an action against an indorser of a bill of exchange, and it is stated that no notice of dishonor was given to the defendant. Under such circumstances, an action cannot be maintained, unless there is a sufficient excuse for not giving the notice; and the question is, whether there is here a sufficient excuse. I think not, because it is not shown that the defendant is an indorser, who, if made

[1] 16 M. & W. 743.

to pay, would have no remedy against the acceptor or any other person. I take the rule to be that an indorser cannot be sued without notice of dishonor, unless it is shown that, if made liable, he would have no remedy against any other person. Bickerdike v. Bollman was held to be within the rule, and Carter v. Flower [1] was held not within the rule. In one case, the excuse was sufficient; in the other, it was not. In Esdaile v. Sowerby,[2] Lord Ellenborough said that knowledge was not to be considered equivalent to notice; and in Carter v. Flower, Parke, B., says that the court ought not to go beyond the decided cases.

AMPHLETT, J. A. I am of the same opinion. Looking at the facts most favorably to the plaintiff, Sherwood was the principal debtor, and the others were all in the position of sureties for the payment of the debt. On another view of the case, it might be held upon the form of the bill that the acceptor was primarily liable; but I think upon the whole the others must be taken to be co-sureties for Sherwood. Then what had Martinez a right to conclude would be done? It was the duty of Sherwood to provide funds to meet the bill when it became due; and the holder accordingly applied to Sherwood. The bill was dishonored, and it was important for Martinez to know that the bill had been dishonored, because then he had a right to sue Sherwood and the other parties for contribution. I think, therefore, that this does not bring Martinez under the rule which says that, if the drawer is primarily liable to pay, then notice need not be given.

Judgment for the defendant.[3]

[1] 16 M. & W. 743. [2] 11 East, p. 117.

[3] Wilks v. Jacks, Peake, 202; Brown v. Maffey, 15 East, 216; Carter v. Flower, 16 M. & W. 743; Maltass v. Siddle, 6 C. B. N. S. 494; Saul v. Jones, 1 E. & E. 59; Foster v. Parker, 2 C. P. D. 18; French v. Bank of Columbia, 4 Cranch, 141; Ramdulollday v. Darieux, 4 Wash. 61; Allen v. King, 4 McL. 128; Buck v. Cotton, 2 Conn. 126; Holland v. Turner, 10 Conn. 308; Ball v. Greaud, 14 La. An. 805; Groton v. Dallheim, 6 Greenl. 476; Rea v. Dorrance, 18 Me. 137; Warder v. Tucker, 7 Mass. 449; Bogy v. Keil, 1 Mo. 748; Glasgow v. Copeland, 8 Mo. 268; Jackson v. Richards, 2 Cai. 343; Richter v. Selin, 8 S. & R. 425, 439; Scarborough v. Harris, 1 Bay, 177, *accord*.

De Berdt v. Atkinson, 2 H. Bl. 336 (*overruled*); Sisson v. Tomlinson, 1 Sel N. P. 18th ed.), 290 (*overruled*); Farmers' Bank v. Van Meter, 4 Rand. 553, *contra*.

In Foster v. Parker, *supra*, Lindley, J., said, p. 20: "To disentitle the defendant as the indorser of a bill of exchange to notice of dishonor, the plaintiff must show that it was the defendant's duty, as between himself and the other parties to the bill, to provide for it." — ED.

DONELLY, Executor of Donelly, v. HOWIE.

In the Exchequer, Ireland, November 13, 1833.

[*Reported in Hayes & Jones*, 436.]

Assumpsit upon a bill of exchange by an indorsee, against his next immediate indorser: the declaration also contained counts for goods sold and delivered, and the money counts.[1] The bill was dated the 22d of November, 1831, and was drawn by one Thomas Corrigan upon and accepted by P. Fleming, for the sum of £36 6*s.* 5½*d.* payable eight months after date. It was indorsed by Corrigan to the defendant, and by the defendant to the testator.

At the trial before Joy, C. B., at the sittings after Michaelmas term, 1832, the first witness for the plaintiff proved the handwriting of the defendant, and stated that he had been the book-keeper of Donelly, who had cashed the bill for the defendant; that by mistake he, the witness, entered the bill in Donelly's books as if it fell due on the 25th of August, 1832, instead of the 25th of July, 1832, when it really became due; that, in consequence thereof, the bill was not presented for payment until the 25th of August, 1832; that on the 27th of August, after the bill had been protested for non-payment, and notice of dishonor given to the defendant, the latter called on Donelly at his office, and said that the bill had not been properly presented; that the witness then said to the defendant that one merchant ought not to take advantage of another, to which the defendant replied that he would not; that he would pay the bill, but that he had not the money just then. Upon being subsequently applied to for payment of the bill, the defendant said that he would not pay it, unless he were recompensed by the prior indorser. It was proved by the defendant that full value for the bill had been given by him, and that the acceptor was insolvent. The jury found, upon an issue sent to them, that the promise to pay, made by the defendant on the 27th of August, was an absolute unconditional promise, and was made with a knowledge of all the circumstances of the case. The counsel for the defendant then objected that the defendant, having been absolutely discharged from all liability on foot of the bill, by the neglect of the holder to present it when it became due, the new promise to pay was without consideration, and could not charge the indorser, and that the defendant was

[1] Only so much of the case is given as relates to the count upon the bill of exchange. — Ed.

not liable thereon; which question the Chief Baron reserved for the consideration of the court, directing the jury to find for the plaintiff, and giving the defendant liberty to move to set aside the verdict, and to have a verdict entered up for himself, or a nonsuit.

A. Brewster, for the defendant, having moved accordingly, the court called on the counsel for the plaintiff to support the verdict.

R. Holmes and *A. N. Oulton*, for the plaintiff. A promise to pay, made by the indorser with a knowledge of all the circumstances, is sufficient to charge him.

[JOY, C. B. A promise to pay made by a party to a bill is only *prima facie* evidence that every thing which is necessary to charge that party has been regularly done. Here the plaintiff has not merely given the promise in evidence, but has also proved that every thing regular has not been done; viz., that the bill was not duly presented.]

Then the objection is, that the want of due presentment and of notice of the dishonor appeared on the plaintiff's case. In Haddock *v.* Bury,[1] it is not stated upon whose case the irregularity of the proceedings appeared; but in Whitaker *v.* Morris[2] it appeared on the plaintiff's case; and, in both instances, the defendant was held liable. The law requires, for the benefit of the indorser, that the indorsee should present the bill at the proper time, and give due notice of its dishonor to the indorser. He may waive that benefit; and a promise to pay, made by him with the full knowledge of all the circumstances, has always been considered as a waiver.

[SMITH, B. If the promise to pay, made with a knowledge of the circumstances, is to be considered as a waiver, the plaintiff is entitled to recover; but, if it be only *prima facie* evidence that every thing necessary to charge the defendant has been regularly performed, it is, like all other *prima facie* evidence, liable to be rebutted, as has been done in the present case.

JOY, C. B. In Lundie *v.* Robertson,[3] Lord Ellenborough held that the promise was merely *prima facie* evidence that every thing was rightly done; and he expressly puts out of his consideration whether it was a waiver or not. So in Greenway *v.* Hindley[4] and Gunson *v.* Metz,[5] it was held to be merely *prima facie* evidence that all was rightly done.]

The cases are divisible into two classes. A promise by the defendant to pay the amount of the bill is *prima facie* evidence that every thing necessary to charge him has been regularly done, and

[1] 7 East, 236, n. (a). [2] 1 Esp. 58. [3] 7 East, 231.
[4] 4 Camp. 52. [5] 1 B. & C. 193.

that evidence may be rebutted; but a promise to pay, made with a knowledge that every thing necessary to charge him has not been done, is a waiver of those requisites; and the defendant renders himself liable thereby. Gibbon *v.* Coggan,[1] Cooper *v.* Wall,[2] Stevens *v.* Lynch,[3] Taylor *v.* Jones,[4] Margitson *v.* Arthur,[5] Haddock *v.* Bury.[6] It is not a *nudum pactum;* for there is a moral consideration to support the promise.

J. Hatchell and *A. Brewster*, in reply. The opinion of Mansfield, C. J., in Borradaile *v.* Lowe,[7] is distinctly in favor of the defendant. The promise is merely *prima facie* evidence that every thing was rightly done to charge the defendant: in that view, it is of value to support the plaintiff's case; but, in any other view, it is of no value whatever, for it is but a *nudum pactum*, unsupported by any consideration. From the 1 Geo. IV. c. 24, § 46, and the case of Alderson *v.* Langdale, it is plain that, if the holder of a bill neglect to present it for payment in due time, or to give due notice of its dishonor to his immediate indorser, he has no demand whatever against him; though the consideration for the indorsement may have been a pre-existing debt, or though a debt may have been created between the parties by the very act of indorsement.

Joy, C. B. Either the judges have been inaccurate in the language they have used, or they have been inaccurately reported, or there has been a fluctuation of opinion upon this subject. But in one of the latest cases on the subject, Standage *v.* Creighton,[8] Denman, C. J., held that a promise to make a part payment was not sufficient evidence that all was rightly done; and he nonsuited the plaintiff, though such promise would, according to what is now contended for, be a waiver, and entitle the plaintiff to recover. I confess, I cannot conceive what is the meaning to be attributed to the word "waiver," when used in a case like the present, where the defendant has been absolutely discharged by the neglect of the plaintiff. He may waive the communication of a fact, but I do not understand how he can waive the existence of the fact. The law requires that the bill should be presented to the acceptor when it becomes due, even though the acceptor be a bankrupt; and, in my opinion, it would be very prejudicial to the mercantile interests of the country, were we to fritter away the known rules of law by establishing this new-fangled doctrine of waiver. The tendency of the modern decisions of courts of justice is to avoid introducing new distinctions, or extending those

[1] 2 Camp. 188.
[2] Chitty on Bills, 9th ed. 503, note.
[3] 12 East, 38.
[4] 2 Camp. 105.
[5] Dan. & L. 157.
[6] 7 East, 236, note (*a*).
[7] 4 Taunt 94.
[8] 5 Car. & P. 406.

which have been already introduced; and to decide cases according to the old well-known rules of the law. Nor is there any pretence for saying that there is a moral obligation on the defendant to pay this bill, whereby the promise might be supported; for the plaintiff, by his own neglect, has discharged every person except the acceptor of the bill.

SMITH, B. I agree in opinion with the other members of the court. The promise of the indorser is of this benefit to the indorsee: that, by proving it, he gives *prima facie* evidence that those acts have been done, which it is necessary he should show were done in order to charge the defendant.

PENNEFATHER, B. We are all of opinion that our judgment upon this point should be for the defendant. In no case has the court held — when the declaration contained an averment that the bill was duly presented for payment, which allegation was disproved — that the plaintiff was entitled to recover, upon proof of a subsequent promise to pay by the defendant. The cases only go this length, that, if a subsequent promise by the defendant to pay the bill be proved, it is evidence that the presentment of the bill was rightly made. As, therefore, we are not bound by any decided cases, and as principle does not require us to go the length sought by the plaintiff in this case, I am of opinion that we ought not to extend the departures which have hitherto been made from the strict rules of law.

Verdict set aside, and nonsuit entered.[1]

[1] The reasoning in the principal case, it is conceived, is unanswerable. One may waive the performance of a condition precedent before default. Phipson v. Kneller, *supra*, p. 469; but how one can waive the performance of a condition precedent after the time for performance has elapsed, has never been explained. Nevertheless, the reasoning of the Irish judges has not prevailed either in England or in this country. The courts, apparently misled by a supposed but false analogy between the promise of a drawer or indorser whom the holder has failed to charge, and the promise of a debtor whose debt is barred by bankruptcy or the Statute of Limitations, have almost uniformly held that the promise to pay of a drawer or indorser is not only evidence of due diligence by the holder, and accordingly admissible under the allegation of due presentment and notice. Lundie v. Robertson, 7 East, 231; Horsford v. Wilson, 1 Taunt. 12; Hopley v. Dufresne, 15 East, 275; Gunson v. Metz, 1 B. & C. 193; Booth v. Jacobs, 8 Nev. & M. 351; Norris v. Salomonson, 4 Scott, 257; Wilkins v. Jadis, 1 M. & Rob. 41; Hicks v. Beaufort, 4 B. N. C. 229; Brownell v. Bonney, 1 Q. B. 39; Curlewis v. Canfield, 1 Q. B. 814; Campbell v. Webster, 2 C. B. 258; Killby v. Rochussen, 18 C. B. N. S. 357; Hazard v. White, 26 Ark. 155; Breed v. Hillhouse, 7 Conn. 523; Dickerson v. Turner, 12 Ind. 228; Lewis v. Brehme, 33 Md. 412; Andrews v. Boyd, 3 Met. 434; Bibb v. Peyton, 18 Miss. 275; Dorsen v. Watson, 14 Mo. 59; Tebbetts v. Dowd, 23 Wend. 379; Meyer v. Hibscher, 47 N. Y. 265; Gawtry v Doane, 51 N. Y. 84; Levy v. Peters, 9 S. & R. 125; Loose v. Loose, 36 Pa. 538; U. S. Bank v. Lyman, 20 Vt. 666; Commercial Bank v. Clark, 28 Vt. 325; Pate v McClure, 4 Rand. 164.

But is also of sufficient effect to bind him, even when it appears affirmatively that due diligence was not used by the holder. Whitaker *v.* Morris, 1 Ch. Jr., Bills, 338 (*semble*); Rogers *v.* Stephens, 2 T. R. 718 (*semble*); Hopes *v.* Alden, 6 East, 16, n. (*semble*); Rabey *v.* Gilbert, 6 H. & N. 536; Cordery *v.* Colvin, 14 C. B. N. S. 374; Woods *v.* Davis, 3 B. & S. 101; Bartholomew *v.* Hill, 5 L. T. Rep. 756; Shepherd *v.* Reddie (Court of Session), March 1, 1870; Allhusen *v.* Mitchell (Court of Session), Feb. 23, 1870; Union Bank *v.* Magruder, 7 Pet. 287 (*semble*); Sigerson *v.* Matthews, 20 How. 496; Yeager *v.* Farwell, 18 Wall. 6; Hazard *v.* White, 26 Ark. 155; Leonard *v.* Hastings, 9 Cal. 236 (*semble*); Breed *v.* Hillhouse, 7 Conn. 523 (but see Peabody *v.* Harvey, 4 Conn. 119; Huntingdon *v.* Harvey, 4 Conn. 124); Curtiss *v.* Martin, 20 Ill. 557; Tobey *v.* Berley, 26 Ill. 426; Smith *v.* Curlee, 59 Ill. 221; Higgins *v.* Robbins, 4 Dana, 100 (but see Lawrence *v.* Ralston, 8 Bibb, 102); Hart *v.* Long, 1 Rob. (La.) 88; Thomas *v.* Mayo, 56 Me. 40; Hopkins *v.* Liswell, 12 Mass. 52; Harrison *v.* Bailey, 99 Mass. 620; Rindge *v.* Kimball, 124 Mass. 209; Parsons *v.* Dickinson, 28 Mich. 56; Robbins *v.* Pinckard, 18 Miss. 275; Salisbury *v.* Renick, 44 Mo. 554; Rogers *v.* Hacket, 21 N. H. 100; Barkalow *v.* Johnson, 1 Harr. 397; Glendening *v.* Canary, 5 Daly, 489; Leary *v.* Miller, 61 N. Y. 488; Moore *v.* Tucker, 3 Ired. 347; Johnson *v.* Arrigoni, 5 Oreg. 485; Smith *v.* Lownsdale, 6 Oreg. 78; Sherer *v.* Easton Bank, 33 Pa. 134; Hall *v.* Frieman, 2 N. & McC. 479; Stone *v.* Smith, 30 Tex. 138; Blodgett *v.* Durgin, 32 Vt. 361; Knapp *v.* Runals, 37 Wis. 135.

See to the same effect Burrows *v.* Hannegan, 1 McL. 309; Sherrod *v.* Rhodes, 5 Ala. 688; Olendorf *v.* Swartz, 5 Cal. 480; Keyes *v.* Fenstermaker, 24 Cal. 329; Campbell *v.* Varney, 12 Iowa, 48; Lewis *v.* Brehme, 33 Md. 412; Creamer *v.* Perry, 17 Pick. 332; Kent *v.* Warner, 12 All. 561; Pratt *v.* Chase, 122 Mass. 262; Miller *v.* Hackley, 5 Johns. 375; Griffin *v.* Goff, 12 Johns. 423; Loose *v.* Loose, 36 Pa. 538; Gregory *v.* Allen, Mart. & Y. 74; Commonwealth *v.* Clark, 28 Vt. 325; Tardy *v.* Boyd, 26 Grat. 631, in which cases the language or conduct of the drawers or indorsers was not thought to be a sufficient recognition of their obligation to pay.

But a promise to pay made by a drawer or indorser in ignorance of the fact of the holder's laches is nugatory. Goodall *v.* Dolley, 1 T. R. 712; Borradaile *v.* Lowe, 4 Taunt. 93; Thornton *v.* Wynn, 12 Wheat. 188; Martin *v.* Winslow, 2 Mas. 241; Kennon *v.* McRea, 7 Port. 175; Walker *v.* Rogers, 40 Ill. 279; Bank of Tennessee *v.* Smith, 9 B. Mon. 609; Landrum *v.* Trowbridge, 2 Met. (Ky.) 281; Blum *v.* Bidwell, 20 La. An. 43; James *v.* Wade, 21 La. An. 548; Byram *v.* Hunter, 36 Me. 217; Lewis *v.* Brehme, 33 Md. 412; Low *v.* Howard, 10 Cush. 159; Kelley *v.* Brown, 5 Gray, 108; Farrington *v.* Brown, 7 N. H. 271; U. S. Bank *v.* Southard, 2 Harr. 473; Tebbetts *v.* Dowd, 23 Wend. 379; Richard *v.* Boller, 6 Daly, 460; Lake *v.* Artisan's Bank, 1 Tr. App. 71; Hunter *v.* Hook, 64 Barb. 468; Lilly *v.* Petteway, 78 N. Ca. 358; Loose *v.* Loose, 36 Pa. 538; Fotheringham *v.* Prince, 1 Bay, 291; Golladay *v.* Union Bank, 2 Head, 64; Ford *v.* Dallam, 3 Cold. 67; Commercial Bank *v.* Clark, 28 Vt. 325.

But a promise to pay made by a drawer or indorser with knowledge of the fact of the holder's laches is none the less operative because of the promisor's ignorance of the legal effect of such laches. Bilbie *v.* Lumley, 2 East, 469; Hughes *v.* Bowen, 15 Iowa, 446; Creshire *v.* Taylor, 29 Iowa, 492; Davis *v.* Gowen, 17 Me. 387; Beck *v.* Thompson, 4 Har. & J. 587; Matthews *v.* Allen, 16 Gray, 594 (overruling earlier Massachusetts cases); Third Nat. Bank *v.* Ashworth, 105 Mass. 503; Ladd *v.* Kenney, 2 N. H. 340; Edwards *v.* Tandy, 36 N. H. 540; Tebbetts *v.* Dowd, 23 Wend. 379; Richter *v.* Selin, 8 S. & R. 438; Schmidt *v.* Radcliffe, 4 Strob. 296. But see *contra*, Spurlock *v.* Union Bank, 4 Humph. 336; Williams *v.* Union Bank, 9 Heisk. 441. — Ed.

GEORGE M'GRUDER, PLAINTIFF IN ERROR, v. THE PRESIDENT, DIRECTORS, AND COMPANY OF THE BANK OF WASHINGTON, DEFENDANTS IN ERROR.

IN THE SUPREME COURT, UNITED STATES, MARCH 13, 1824.

[*Reported in* 9 *Wheaton*, 598.]

THE opinion of the court was delivered by Mr. Justice JOHNSON.

This case comes up from the Circuit Court of the District of Columbia, in which a suit was instituted against the plaintiff here, as indorser of one Patrick M'Gruder.

The facts are exhibited in a stated case, upon which, by consent, an alternative judgment is to be entered. The judgment below was for the plaintiffs in the action; and the defendant brings this writ of error to have that judgment reversed, and a judgment entered in his favor.

The leading facts in the cause are so much identified with those in the case of Renner *v.* The Bank of Columbia, decided at the present term, on the question relative to the days of grace, that the decision in that cause disposes of the principal question raised in this.

But there is another point presented in the present cause. There was no actual demand made on the drawer of this note, and the question intended to be presented was whether the facts stated will excuse it.

At the time of drawing the note, and until within ten days of its falling due, the maker was a housekeeper in the District of Columbia. But he then removed to the State of Maryland, to a place within about nine miles of the District. The case admits that neither the holder of the note, nor the notary, knew of his removal or place of residence; but the circumstances of his removal had nothing in them to sanction its being construed into an act of absconding. The words of the admission to this point are that he "went to the house where the said Patrick had last resided, and from which he had removed, as aforesaid, in order there to present the said note, and demand pay ment of the same; and not finding him there, and being ignorant of his place of residence, returned the said note under protest."

The alternative in which the judgment of the court is to be rendered is not very appropriately stated; but since the absurdity cannot have entered into the minds of the parties, that, not knowing of the removal or present abode of the drawer, the holder was still bound to follow him into Maryland, we will construe the submission with reference to the facts admitted; and then the question raised is, whether

the holder had done all that he was bound to do, to excuse a personal demand upon the maker.

On this subject the law is clear: a demand on the maker is, in general, indispensable; and that demand must be made at his place of abode or place of business. That it should be strictly personal, in the language of the submission, is not required: it is enough if it is at his place of abode, or, generally, at the place where he ought to be found. But his actual removal is here a fact in the case; and in this, as well as every other case, it is incumbent upon the indorsee to show due diligence. Now, that the notary should not have found the maker at his late residence, was the necessary consequence of his removal, and is entirely consistent with the supposition of his not having made any one of those inquiries which would have led to a development of the cause why he did not find him there. *Non constat*, but he may have removed to the next door; and the first question would, most probably, have extracted information that would have put him on further inquiry. Had the house been shut up, he might, with equal correctness, have returned, "that he had not found him;" and yet that clearly would not have excused the demand, unless followed by reasonable inquiries.

The party must then be considered as lying under the same obligations as if, having made inquiry, he had ascertained that the maker had removed to a distance of nine miles, and into another jurisdiction. This is the utmost his inquiries could have extracted, and marks, of course, the outlines of his legal duties.

Mere distance is, in itself, no excuse from demand; but, in general, the indorsee takes upon himself the inconvenience resulting from that cause. Nor is the benefit of the post-office allowed him, as in the case of notice to the indorser.

But the question on the recent removal into another jurisdiction is a new one, and one of some nicety. In case of original residence in a State different from that of the indorser, at the time of taking the paper, there can be no question; but how far, in case of subsequent and recent removal to another State, the holder shall be required to pursue the maker, is a question not without its difficulties.

We think that reason and convenience are in favor of sustaining the doctrine that such a removal is an excuse from actual demand.[1] Pre-

[1] Foster v. Julien, 24 N. Y. 28; Cummings v. Fisher, Anth. N. P. 1; Gist v. Lybrand, 8 Oh. 307; Lehman v. Jones, 1 Watts & S. 126; Reid v. Morrison, 2 Watts & S. 401; Becker v. Levy, 5 Pa. L. J. 298; Gillespie v. Hannahan, 4 McC. 503; Eaton v. McMahon, 42 Wis. 484 (*semble*), *accord*.

Wheeler v. Field, 6 Met. 290 (overruling Putnam v. Sullivan, 4 Mass. 45); Pierce v. Cate, 12 Cush. 190; Grafton Bank v. Cox, 13 Gray, 503, *contra*, in which cases it

cision and certainty are often of more importance to the rules of law than their abstract justice. On this point, there is no other rule that can be laid down which will not leave too much latitude as to place and distance. Besides which, it is consistent with analogy to other cases that the indorser should stand committed in this respect by the conduct of the maker. For his absconding or removal out of the kingdom, the indorser is held in England to stand committed; and, although from the contiguity, and in some instances reduced size of the States, and their union under the general government, the analogy is not perfect, yet it is obvious that a removal from the seaboard to the frontier States, or *vice versa*, would be attended with all the hardships to a holder, especially one of the same State with the maker, that could result from crossing the British channel.

With this view of the subject, we are of opinion that the judgment below, although rendered on a different ground, must be sustained.

Judgment affirmed.

GEORGE B. MAGRUDER, PLAINTIFF IN ERROR, *v.* THE UNION BANK OF GEORGETOWN, DEFENDANTS IN ERROR.

IN THE SUPREME COURT, UNITED STATES, JANUARY TERM, 1830.

[*Reported in* 8 *Curtis*, 299; 3 *Peters*, 87.]

ERROR to the Circuit Court for the District of Columbia. The case is stated in the opinion of the court.

Coxe, for the plaintiff.

Dunlop and *Key*, contra.

MARSHALL, C. J., delivered the opinion of the court. This action was brought by the Union Bank of Georgetown against George B. Magruder, as indorser of a promissory note made by George Magruder. The maker of the note died before it became payable, and letters of administration on his estate were taken out by the indorser. When the note became payable, suit was commenced against the indorser, without any demand of payment other than the suit itself, without any protest for non-payment, and without any notice that the note was not paid, and that the holder looked to him as indorser for payment. Upon these circumstances, the counsel for the defendant moved the

was held that presentment should be made at the last place of business or residence of a maker who had absconded or removed into another jurisdiction.

See Hepburn *v.* Toledano, 10 Mart. 643; Herrick *v.* Baldwin, 17 Minn. 209.

Conf. Clayton *v.* Coburn, 42 Conn. 348. — ED.

court to instruct the jury that, before the plaintiff can recover in this action, it is essential for him to prove demand, and notice to the indorser of the non-payment, which not being done, the verdict should be for the defendant. But the court refused to give this instruction, and charged the jury that no demand or notice of non-payment was necessary. To this opinion the counsel for the defendant in the Circuit Court excepted, and has brought the cause to this court by writ of error.

The general rule that payment must be demanded from the maker of a note, and notice of its non-payment forwarded to the indorser within due time, in order to render him liable, is so firmly settled that no authority need be cited in support of it. The defendant in error does not controvert this rule, but insists that this case does not come within it, because demand of payment and notice of non-payment are totally useless, since the indorser has become the personal representative of the maker. He has not, however, cited any case in support of this opinion, nor has he shown that the principle has been ever laid down in any treatise on promissory notes and bills. The court ought to be well satisfied of the correctness of the principle, before it sanctions so essential a departure from established commercial usage.

This suit is not brought against George B. Magruder as administrator of George Magruder, the maker of the note, but against him as indorser. These two characters are as entirely distinct as if the persons had been different. A recovery against George B. Magruder, as indorser, will not affect the assets in his hands as administrator. It is not a judgment against the maker, but against the indorser of the note. The fact that the indorser is the representative of the maker does not oppose any obstacle to proceeding in the regular course. The regular demand of payment may be made, and the note protested for non-payment, of which notice may be given to him as indorser with as much facility as if the indorser had not been the administrator. It is not alleged that any difficulty existed in proceeding regularly: the allegation is that it was totally useless.

The note became payable on the 8th day of November, 1824. The writ was taken out against the indorser on the 26th day of April, 1825. If this unusual mode of proceeding can be sustained, it must be on the principle that, as the indorser must have known that he had not paid the note as the representative of the maker, notice to him was useless. Could this be admitted, does it dispense with the necessity of demanding payment? It is possible that assets which might have been applied in satisfaction of this debt, had payment been demanded, may have received a different direction. It is

possible that the note may have been paid by the maker before it fell due. Be this as it may, no principle is better settled in commercial transactions than that the undertaking of the indorser is conditional. If due diligence be used to obtain payment from the maker, without success, and notice of non-payment be given to him in time, his undertaking becomes absolute, not otherwise. Due diligence to obtain payment from the maker is a condition precedent, on which the liability of the indorser depends. As no attempt to obtain payment from the maker was made in this case, and no notice of non-payment was given to the indorser, we think the Circuit Court ought to have given the instruction prayed for by the defendant in that court.

The judgment is reversed, and the cause remanded, with directions to award a *venire facias de novo*.[1]

ERWIN AND ANOTHER v. ADAMS.

IN THE SUPREME COURT, LOUISIANA, APRIL, 1831.

[*Reported in* 2 *Louisiana Reports*, 318.]

THIS was an action against the maker of a promissory note, made payable at the counting-house of William Kenner & Co. in New Orleans.

[1] Juniata Bank *v.* Hale, 16 S. & R. 157; Groth *v.* Gyger, 31 Pa. 271, *accord*.

For further illustrations of the rule that presentment for payment should be made to the personal representative of a deceased drawee or maker, see Toby *v.* Maurian, 7 La. 498; Harp *v.* Kenner, 19 La. An. 68; Gower *v.* Moore, 25 Me. 16; Johnson *v.* Harth, 1 Bail. 482; Price *v.* Young, 1 N. & McC. 488.

If there is no personal representative, presentment for payment should be made at the house of the drawee or maker. Bank of Washington *v.* Reynolds, 2 Cranch, C. C. 289; Huff *v.* Hatch, 2 Disn. 68; Price *v.* Young, 1 N. & McC. 488. But in Haslett *v.* Kunhardt, Rice, 189, the maker having been drowned, with all his family, two days before the maturity of the note, presentment at the unoccupied house of the deceased was held to be unnecessary. It has also been held, in jurisdictions where an administrator is not obliged to pay the debts of the deceased before the expiration of a certain time after his appointment, that a bill or note falling due before the lapse of such time need not be presented at all. Landry *v.* Stansbury, 10 La. 484; Hale *v.* Burr, 12 Mass. 86. See also Davis *v.* Francisco, 11 Mo. 572. Similarly, presentment is excused when a bank has been enjoined not to pay a check. Conwell *v.* Lovett, 6 Wend. 869. But in no case does the death of the drawee or maker dispense with the notice to drawers and indorsers of the fact of non-payment. Oriental Bank *v.* Blake, 22 Pick. 208; Haslett *v.* Kunhardt, *supra*. See also Lane *v.* Bank of W. Tenn. 9 Heisk. 419.

If the drawee dies before presentment for acceptance, acceptance according to the tenor being thereby rendered impossible, the holder may treat the bill as dishonored as soon as he learns of the drawee's death, and give notice of non-acceptance to the drawer and indorsers. See Smith *v.* Bank of N. S. Wales, L. R. 4 P. C. 194, 205–208; or he may wait till its maturity (if the bill is not payable after sight), and then present for payment to the representative of the deceased. — ED.

At the time the note became due, Kenner & Co. had a counting-house in New Orleans, but it had ceased to exist at the inception of the suit. The plaintiffs failing to prove a demand, there was judgment of nonsuit, from which they appealed.

MATHEWS, J., delivered the opinion of the court. This is a suit against the maker of a promissory note, by the executors of the payee. Judgment of nonsuit was rendered in the court below, from which the plaintiffs appealed.

The note on which this action is founded was made payable at the counting-house of William Kenner & Co., in New Orleans; and it does not appear in evidence that any demand was there made; but it is admitted in the statement of facts that previous to the commencement of the present suit the firm had failed, and they had no counting-house. This circumstance changes the situation of the parties now before the court from that of the suitors in Mellon v. Croghan.[1] In that case, it is nowhere decided that a demand, at the time the note became due, was necessary to charge the maker; but it was considered as a condition precedent to the right of recovery on the part of the plaintiff, that a demand of payment should be made at the place designated, previous to the institution of the suit, — *sed lex neminem cogit ad vana et impossibilia.* And, in the present case, it is agreed that, at the time of commencing the action, it was impossible to make a demand of payment at the place designated in the note, for no such place existed.

It is therefore ordered, &c., that the judgment of the District Court be avoided, reversed, and annulled, and proceeding here to give such judgment as ought then to have been given.

It is further ordered, adjudged, and decreed that the plaintiffs and appellants do recover from the defendant and appellee twenty-four hundred and forty-seven dollars and twenty-two cents, with ten per cent per annum interest thereon, from the 4th of April, 1823, until paid; and that the defendant and appellee pay costs in both courts.[2]

[1] 15 Mart. 428.

[2] Roberts v. Mason, 1 Ala. 378; Central Bank v. Allen, 16 Me. 41; Apperson v. Bynum, 5 Cold. 341; Bynum v. Apperson, 9 Heisk. 632 (*semble*); Lane v. Bank of West Tennessee, 9 Heisk. 419 (*semble*), *accord.* — ED.

GEORGE DENNIE *v.* JOHN S. WALKER.

IN THE SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, DECEMBER TERM, 1834.

[*Reported in 7 New Hampshire Reports*, 199.]

THIS case was assumpsit against the defendant as indorser of two promissory notes, dated April 17th, 1832. The notes were made and signed at Portsmouth, by William Walker, a son of the defendant, and were drawn payable to the defendant, or his order, and by him indorsed to the plaintiff. One of said notes was payable in twelve months from its date, the other in eighteen months. At the time said notes were made, the maker and indorser were residents of Portsmouth, and the plaintiff was a resident of Boston; and the several parties retain the same residence.

The maker of the notes, before their maturity, sailed from Portsmouth on a whaling voyage, and has not yet returned; but his family continue to reside at Portsmouth. The defendant knew that the maker had gone on the above described voyage. The plaintiff did not, when the notes became due, make any search or inquiry for the maker of the notes, or make any demand of payment. It was agreed that judgment should be rendered as the court should direct, upon consideration of the foregoing facts.[1]

Hackett, for the plaintiff.

Goodrich, for the defendant.

UPHAM, J. In this case, an attempt is made to hold the indorser of the note liable without a demand upon the maker. No excuse is rendered why demand was not made upon the maker, except that he was absent on a whaling voyage at the time the note became due; but it is admitted that his residence remained unchanged, and that his family still continued to reside in Portsmouth.

A removal without the bounds of the government, after the making of a note, and before it becomes due, and where no place of payment of the note is specified, renders a demand upon the maker unnecessary; but this is an exception to the general rule, and must be construed strictly. Any thing less than an actual change of residence, by removal without the State, would leave the rule too uncertain. In case of a mere absence from one's place of residence, it is immaterial whether it is for a longer or a shorter period. If the maker has a known domicile, or place of business within the State, a demand of

[1] Only so much of the case is given as relates to the question of presentment — ED.

payment at such place is essential, in order to charge the indorser. McGruder v. Bank of Washington; Bailey on Bills, 127; Upham v. Prince,[1] Anderson v. Drake, Moodie v. Morrall,[2] Whittier v. Graffam,[3] Freeman v. Boynton,[4] Lincoln and Kennebec Bank v. Page,[5] and Lincoln and Kennebec Bank v. Hammatt.[6]

Judgment for the defendant.[7]

PLATT ADAMS v. SIMEON LELAND AND OTHERS.

IN THE COURT OF APPEALS, NEW YORK, MARCH, 1864.

[*Reported in* 30 *New York Reports*, 309.]

THE defendants were sued as indorsers of a promissory note.[8]

At the close of the case, the defendants' counsel moved to dismiss the complaint, on the ground that the plaintiff had failed to prove a demand on the makers at the maturity of the note, which motion was denied, and the defendants excepted.

The plaintiff had a verdict; and judgment being entered, on appeal to the general term, the same was affirmed. The defendants bring this appeal: no counsel appears for them.

E. Moore, for the respondent.

WRIGHT, J. I am of the opinion that the nonsuit was properly denied. The note was dated at New York, and the place of business of the makers, when it was given, was at No. 110 Broadway. It seems that, when payable (and unknown to the holder), the firm of Seymour, Moore, & Co. (the makers) had been dissolved, and a new firm (Seymour, Morton, & Co.) had succeeded them in business at the same place. There was a person in attendance in the office from whom the notary demanded payment, but who refused to pay, saying he had no money, and referred him to Mr. Lincoln, an agent of the makers, at No. 54 William Street. The notary went to No. 54 William Street, and saw Lincoln, who did not dispute his agency or connection with the makers, but knew nothing about the note, and refused to pay it. Upon being inquired of, if he knew where the makers were, he said he supposed they were "out West."

[1] 12 Mass. 14. [2] 1 S. Car. 367. [3] 8 Green, 84.
[4] 7 Mass. 483. [5] 9 Mass. 155. [6] 9 Mass. 159.

[7] Whittier v. Graffam, 8 Greenl. 82; Sanger v. Stimpson, 8 Mass. 260; Moodie v. Morrall, 1 Mill. C. R. 367, *accord*.

If the maker have no domicile and is at sea, presentment is excused. Moore v. Coffield, 1 Dev. 247. — ED.

[8] The statement of facts, being substantially reproduced in the opinion of the court, has been omitted. — ED.

When a promissory note is not made payable at any particular place, generally, in order to charge the indorser, payment must be demanded of the maker at his place of residence or business. Yet there are various exceptions to this rule. If the maker has no known residence or place, the holder will be excused from making any demand whatever. So, if in the intermediate period between the time when the note was made and when it becomes due, the maker has removed his domicile or place of business to another State, the holder will be excused for non-presentment for payment, and will be entitled to the same recourse against the indorsers, as if there had been a due presentment. It will, in such case, be sufficient to present the note at his former residence or place of business. McGruder v. The Bank of Washington, Taylor v. Snyder.

In this case, the residence of the makers, when this note was made, was in the city of New York, and their place of business at No. 110 Broadway. The note was presented for payment there. It was found that they had removed, and been succeeded in business by another firm. The notary was referred by their successors to a Mr. Lincoln, their agent, for information as to the note and the whereabouts of the makers. Lincoln did not dispute his agency or connection with them, but knew nothing about the note. He said he supposed they were "out West." The common understanding of the phrase is "in the Western States:" it means out of this State.

Not finding the makers of the note, or any one of them, at No. 110 Broadway, the place of business of the firm when the note was made, the question is whether due diligence was used to ascertain where to demand. The makers had removed their place of business unknown to the holder of the paper; and, on inquiry of their agent, the notary was informed by him they were "out West." This was equivalent to saying that they were out of the State. This, I think, was sufficient. Foster v. Julien.[1] When the maker of a note has removed into another State, subsequent to the making of the note, the holder need not follow him to make a demand; but it is sufficient to present the note at his former place of residence or business. Indeed, in such case, the holder is excused from making a demand. The judgment should be affirmed.

All the judges concurred, except INGRAHAM, J., who read an opinion in favor of reversal. *Judgment affirmed.*[2]

[1] 24 N. Y. 28.

[2] In the following cases, due diligence having been used, presentment was excused: Franklin v. Verbois, 6 La. 727; Peet v. Zanders, 6 La. An. 864; Shepard v. Citizens' Co., 8 Mo. 272; Holtz v. Boppe, 37 N. Y. 634; Ratcliffe v. Planters' Bank, 2 Sneed, 425.

In the following cases, due diligence was not used: Collins v. Butler, 2 Stra. 1087;

MOSES v. ELA.

IN THE SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, JUNE, 1862.

[*Reported in* 43 *New Hampshire Reports*, 557.]

THIS is assumpsit by the indorsee against the indorser of a promissory note; and the case having been tried upon the general issue, and a verdict returned for the plaintiff, the defendant moved for a new trial for errors in the rulings and instructions of the court. The facts sufficiently appear in the opinion of the court.

Hackett, for the defendant, to the point that notice was not excused, cited Chitty on Bills, ch. 10, 438; Bond *v.* Farnham,[1] Wilkes *v.* Jacks;[2] Parsons's Merc. Law, 118.

Marston & Collins, for the plaintiff, to the same point, cited Bond *v.* Farnham,[3] Mead *v.* Small,[4] Andrews *v.* Boyd,[5] Corney *v.* DaCosta, Mechanics' Bank *v.* Griswold;[6] Story on Promissory Notes, § 282; Marshall *v.* Mitchell;[7] 3 Kent Com. 113.

BELLOWS, J. This is an action by the indorsee against the defendant as the indorser of a promissory note made by J. K. & S. Merrill, and payable to the defendant's order in six months. There was evidence tending to prove that the defendant took a mortgage of the makers of all their property, to indemnify him for indorsing this and other notes for them, a considerable portion of which property was disposed of by them, with Ela's consent, and applied to other purposes. The court instructed the jury that if, after signing the note and before its maturity, the defendant received from the makers a mortgage of all their property, to indemnify him for signing this and other notes, he must be considered as having waived demand and notice; and such is the doctrine of many decided cases, among which, a leading one, is

Mitchell *v.* Young, 21 La. An. 279; Granite Bank *v.* Ayers, 16 Pick. 392; Wyman *v.* Adams, 12 Cush. 210; Porter *v.* Judson, 1 Gray, 175; Ellis *v.* Commercial Bank, 8 Miss. 294 (*semble*); Plahto *v.* Patchin, 26 Mo. 389; Jarvis *v.* Garnett, 89 Mo. 268; Packard *v.* Lyon, 5 Duer, 82; Duncan *v.* McCullough, 4 S. & R. 480; Smith *v.* Fisher, 24 Pa. 222; Galpin *v.* Hard, 8 McC. 394; Eaton *v.* McMahon, 42 Wis. 484.

See also Staylor *v.* Ball, 24 Md. 183; Benedict *v.* Caffe, 5 Duer, 226.

Conf. Smith *v.* Bellamy, 2 Stark. 228. — ED.

[1] 5 Mass. 170, and Rand's note to that case, in edition of 1835, and authorities collected.

[2] Peake, 202.

[3] 5 Mass. 170.

[4] 2 Greenl. 207.

[5] 8 Met. 489.

[6] 7 Wend. 165.

[7] 34 Me. 227.

Bond v. Farnham,[1] where, although the property was not sufficient to indemnify the indorser, yet, as it was all the maker had, it was held by Parsons, C. J., that a demand would be fruitless, and the indorser must be considered to have waived it, and as having engaged with the maker, on receiving all his property, to take up his note. No authorities, however, were cited, and a verdict having been taken by consent, the question must have been whether a jury, upon the evidence, could have found for the plaintiff. A similar doctrine is laid down in Story on Promissory Notes, §§ 281, 283; Story on Bills, § 374; Chitty on Bills (10th Am. ed.), 358, in notes. So, also, are Mead v. Small,[2] Prentiss v. Donelson,[3] Duval v. Farmers' Bank of Maryland,[4] Bank v. Griswold,[5] Taylor v. French,[6] Benton v. Baker,[7] Carlisle v. Hill,[8] Stephenson v. Primrose,[9] Kyle v. Greene.[10]

On the other hand, it is contended that mere indemnity does not dispense with notice, unless the indorser has come under obligation to the maker to pay the debt. Such is the doctrine of Kramer v. Sanford,[11] where Gibson, C. J., says the contrary has no footing in Westminster Hall. In Denny v. Palmer,[12] Ruffin, C. J., has examined the subject with great care and ability, and his conclusion accords with the views of Gibson, C. J., before referred to; holding that if the note be for the accommodation of the indorser, or if the maker place funds in his hands to meet it, he is not entitled to notice, but that no agreement to take up the note is to be implied by law from the fact that the maker has mortgaged all his property, as indemnity, to the indorser; and that in such case notice is necessary; and he considers Bond v. Farnham,[1] which is often cited as the leading case, as standing upon the ground that there was evidence upon which the jury might have found that the indorser had agreed to pay the note, which agreement he supposes was the foundation of that decision. If not so to be understood, then it must be regarded as overruled by Creamer v. Perry,[13] where the maker assigned property to a trustee to indemnify the indorser, among other things, for his liabilities as such; and it was held that notice was not dispensed with, Shaw, C. J., holding that the assignment was an indemnity against his legal liabilities, and, as that was only conditional upon his having due notice, the lien upon the fund depended also upon the same condition. See also Rand's note to Bond v. Farnham.[1]

[1] 5 Mass. 170.
[2] 2 Greenl. 207.
[3] 5 Conn. 175.
[4] 9 Gill & Johns. 31.
[5] 7 Wend. 165.
[6] 4 E. D. Smith, 458.
[7] 1 S. & R. 334.
[8] 10 Ala. 398.
[9] 8 Port. 155.
[10] 14 Ohio, 495.
[11] 4 W. & S. 328.
[12] 5 Ire. 610.
[13] 17 Pick. 332.

In our own State, in Woodman *v.* Eastman,[1] it is laid down by Parker, C. J., that the indorser who has received a mortgage of the maker for his security is still entitled to notice. He says (page 367) that the fact that the indorser, if compelled to pay, will not suffer loss, can hardly modify or control the ordinary legal rights or liabilities of the parties arising from the indorsement. The same principle is recognized in Seacord *v.* Miller [2] and Marston *v.* Bank of Mobile,[3] Spencer *v.* Harvey.[4]

Upon a careful examination of the cases, we are fully satisfied with the decision of our own court in Woodman *v.* Eastman; and it is, we think, conclusive upon the case before us. In both cases, the indorser had security by mortgage; and the only difference is, that here all the maker's property was mortgaged, while in Woodman *v.* Eastman it may have been otherwise; but in this case the property was suffered to remain in the makers' possession, and they were allowed to dispose of it for other purposes. The fact that all their property was thus mortgaged, unless shown to be ample security, can bear only upon these views, namely, that a demand might be of no avail, for want of means in the makers; and also that the notice would not, for the same reason, enable the indorser to obtain further indemnity. As to the first, it is settled that insolvency in the maker is no excuse for not giving notice. Lawrence *v.* Langley,[5] Benedict *v.* Caffe;[6] Story on Promissory Notes, § 286, and cases; Chitty on Bills (10th Am. ed.), 354, and notes. As to the second point, the notice would at least, as suggested by the defendant's counsel, put the indorser upon his guard, to take possession of the property mortgaged and turn it to the best account. When funds for meeting the note are placed in the indorser's hands to be so applied, it may well be regarded that he has undertaken to pay it, and notice in such case could not reasonably be required; and it would be the same where the indorser had expressly agreed to pay it upon having funds placed in his hands. But a mere indemnity, by the way of mortgage, giving to the indorser no funds which he could apply to the payment of the note when due, stands upon a footing entirely different, and furnishes no evidence of an agreement to pay the note. In fact, only the maker himself could apply the property so mortgaged to the payment of the note at its maturity; and, therefore, it cannot be reasonably urged that an agreement by the indorser to pay can be inferred from the mere fact of the mortgage, inasmuch as the duty to pay remains as before upon the maker, and he alone can apply the property mortgaged to that object; and, upon payment, the lien of the indorser is gone.

[1] 10 N. H. 367. [2] 3 Kernan, 55. [3] 10 Ala. 284.
[4] 17 Wend. 489. [5] 14 N. H. 70. [6] 5 Duer (N. Y.), 226.

The obligation to give notice arises from the fact that the duty to pay is upon the maker, and that the indorser may rightfully rely upon his making payment, unless he is duly notified of his failure to do so; and such is the contract between the indorser and indorsee. If, however, by a contract between the maker and indorser, the duty to pay is upon the latter, as when the maker signs the note for the accommodation of the indorser, who receives the money; or when the maker places in the hands of the indorser the money to pay it, and he assumes to do so, then demand and notice are not necessary; because, as between the indorser and the maker, the duty to pay is upon the former, and no remedy over is affected by want of notice. In the case of insolvency, or security by mortgage merely, without placing in the indorser's hands the means of present payment, there is no ground for saying that his remedy over cannot be affected by a failure to make the due presentment which is implied in every contract of indorsement as a condition for the indorser's liability. In the case of insolvency, it is not certain that the maker may not, through his friends or otherwise, have provided the means to pay the note when presented; and to the benefit of that chance the indorser, by the terms of the contract, is entitled. So, too, he is entitled to notice of the dishonor, that he may himself judge what steps shall be taken. Story on Promissory Notes, § 286, and note 1; and Chitty on Bills (10th Am. ed.), 354, and notes; Camidge *v.* Allenby. In the case of a mere mortgage, it is obvious that, in a large portion of instances, notice would be still more important to the indorser, that he might at once take measures to make his security available. On this point, then, we hold the instructions of the court to be erroneous.[1]

The verdict must be set aside, and there must be *A new trial.*[2]

[1] A portion of the case relating to a question of procedure has been omitted. — ED.

[2] Creamer *v.* Perry, 17 Pick. 332; Haskell *v.* Boardman, 8 All. 38; Denny *v.* Palmer, 5 Ired. 610 (*semble*); Watkins *v.* Crouch, 5 Leigh, 522; Wilson *v.* Senier, 14 Wis. 380, *accord.*

Stephenson *v.* Primrose, 8 Port. 155 (*semble*); Prentiss *v.* Danielson, 5 Conn. 175 (*semble*); Marshall *v.* Mitchell, 34 Me. 227 (*semble*); Duvall *v.* Farmers' Bank, 9 Gill & J. 31 (*semble*); Brandt *v.* Mickle, 28 Md. 486 (*semble*); Bond *v.* Farnham, 5 Mass. 170; Perry *v.* Green, 4 Harris, 61 (*semble*); Mechanics' Bank *v.* Griswold, 7 Wend. 165; Commercial Bank *v.* Hughes, 17 Wend. 94 (*semble*); Spencer *v.* Harvey, 17 Wend. 489 (*semble*); Barton *v.* Baker, 1 S. & R. 334; Bank of S. Ca. *v.* Myers, 1 Bail. 412 (*semble*); Barrett *v.* Charleston Bank, 2 McMull. 191 (*semble*); Swan *v.* Hodges, 3 Head, 251 (*semble*), *contra.*

See Seacord *v.* Miller, 13 N. Y. 55; Kramer *v.* Sandford, 4 W. & S. 328.

Nor are demand and notice waived, though the property assigned by the indorser is an adequate indemnity against liability on the note, unless the indorser in effect assumed the position of principal debtor. Ray *v.* Smith, 17 Wall. 411; Holland

v. Turner, 10 Conn. 308; Lockwood v. Crawford, 18 Conn. 374 (*semble*); Dufour v Morse, 9 La. 338; Creamer v. Perry, 17 Pick. 332; Haskell v. Boardman, 8 All. 38; Woodman v. Eastman, 10 N. H. 359; Seacord v. Miller, 18 N. Y. 55; Denny v. Palmer, 5 Ired. 610; Kramer v. Sandford, 4 W. & S. 328; Wilson v. Senier, 14 Wis. 380 (*semble*).

But see *contra*, Burrows v. Hannegan, 1 McL. 309 (*semble*); Stephenson v. Primrose, 8 Port. 155 (*semble*); Holman v. Whiting, 19 Ala. 703 (*semble*); Walker v. Walker, 7 Ark. 542; Mead v. Small, 2 Greenl. 207; Marshall v. Mitchell, 34 Me. 227 (*semble*); Lewis v. Kramer, 3 Md. 265 (*semble*); Watt v. Mitchell, 7 Miss. 131; Perry v. Green, 4 Harris, 61 (*semble*); Mechanics' Bank v. Griswold, 7 Wend. 65; Commercial Bank v. Hughes, 17 Wend. 94 (*semble*); Spencer v. Harvey, 17 Wend. 489 (*semble*); Develing v. Ferris, 18 Oh. 170; Bank of S. Ca. v. Myers, 1 Bail. 412; Barrett v. Charleston Bank, 2 McMull. 191; Durham v. Price, 5 Yerg. 300 (*semble*); Swan v. Hodges, 8 Head, 251 (*semble*).

In Creamer v. Perry, *supra*, Shaw, C. J., said (p. 335): "We think the effect of this assignment was to secure and indemnify the defendant against his legal liabilities; and as his liability as indorser on this note was conditional, and depended upon the contingency of his having seasonable notice of its dishonor, his claim upon the property depended upon the like contingency." In Kramer v. Sandford, *supra*, Gibson, C. J., said (p. 331): "The true criterion seems to be the obligation to take up the note. When that remains with the maker, it continues to be the duty of the indorsee to apprise the indorser of the maker's default: when it has devolved on the indorser himself, he needs no notice."

An indorser who has released the prior parties from all liability upon the instrument is not entitled to notice of its dishonor. Burke v. McKay, 2 How. 66 — Ed.

CHAPTER VIII.

A BILL OR NOTE IS IN THE NATURE OF A SPECIALTY.[1]

SECTION I.

A Bill or Note is treated as a Specialty in Pleading.

MILTON'S CASE.

IN THE EXCHEQUER, MICHAELMAS TERM, 1668.

[*Reported in Hardres*, 485.]

IN an action for £100 upon a bill of exchange accepted, the plaintiff declared that, by the custom of England, if a merchant send a bill of exchange to another merchant to pay money to another person, and the bill be accepted, that he who accepts the bill does thereby become chargeable with the sum therein contained; and that a certain merchant drew a bill of exchange upon the defendant, payable to the plaintiff, which bill the defendant accepted, *per quod actio accrevit.* And, upon *nil debet* pleaded, a verdict passed for the plaintiff; and now it was moved in arrest of judgment by

Offley. An action of debt lies not in this case, because there is no privity betwixt the plaintiff and defendant; nor any contract in deed or in law; and, where these fail, debt lieth not.[2] Where goods are delivered to another at the request of a third person, debt lies not

[1] "A bill of exchange is commonly drawn on a small piece of paper, and comprised in two or three lines, being so noble and excellent, though it cannot properly, as it is conceived, be called a specialty, because it wanteth those formalities which by the common law of England are thereunto required, as seal, delivery, and witnesses; yet it is equivalent thereunto, if not beyond or exceeding any specialty or bond in its punctuality and precise payment; for, if once accepted, it must be paid when due, otherwise the acceptor loses his credit." Marius, 8.

A common-law specialty and a bill or note are but different species of the class of contracts known as "formal contracts;" *i. e.*, contracts which derive their obligatory force from the mere fact that they are executed according to certain invariable forms or solemnities. In other words, just as a promise sealed and delivered *animo contrahendi* binds the obligor without more, so an order or promise to pay money, made according to the custom of merchants and delivered *animo solvendi*, becomes *ipso facto* an imperative obligation. — ED.

[2] Vide 19 Hen. VI.; Dyer, 21; Rol. Part 1, 594.

upon a promise to pay for them, nor an *indebitatus assumpsit*. Otherwise, when money is received to another man's use; as when a sheriff levies money upon an execution, though he make no return of it, debt lies against him, because he levied and received it to the plaintiff's use. And the law creates a contract there, but not in our case.

Stevens, pro quer. It is a rule in law that, where the common law, or any particular custom, creates a duty, debt lies for it; as in case of a tailor who by the common law may have an action of debt, or a *quantum meruit* for making up a suit of clothes. So in case of a particular custom, as in 11 Hen. VI. 24, a custom of a manor to collect rents, and receive twenty shillings for the same, debt lies for it; yet there is no privity of contract. So he prayed judgment *pro quer.*

HALE, C. B. This is a case of weight and concern for the future, and deserves consideration. Declarations upon bills of exchange have often varied. Sometimes declarations have been upon a custom amongst merchants only, without laying an express promise. Afterwards they came to declare upon an assumpsit. And, after all, if an action of debt will lie, it will be a short cut, and pare off a long recital. For, if debt lies, a man may declare upon a bill of exchange accepted in debt, or in an *indebitatus assumpsit*, for so much money. And, without doubt, if the common law, or the custom of a place, create a duty, debt lies for it, without more ado: as in the case of a toll due by custom;[1] and so in cases of a certain sum due by custom for pound breach to the lord of a manor, or to a jailer for barr fees.[2] But the great question here is, whether or not a debt or duty be hereby raised. For if it be no more than a collateral engagement, order, or promise, debt lies not; as in the case that has been cited, of goods delivered by A to B at the request of C, which C promised to pay for, if the other does not; for in that case a debt or duty does not arise betwixt A and C, but a collateral obligation only. In our case, the acceptance of the bill amounts clearly to a promise to pay the money; but it may be a question whether it amounts to a debt or not. For, if so, then it is assignable to the king, or by commissioners of bankrupts. And it were worth while to inquire what the course has been amongst merchants, or to direct an issue for trial of the custom amongst merchants in this case. For although we must take notice in general of the law of merchants, yet all their customs we cannot know but by information. And although the verdict here finds it in effect, and so might seem to inform us, yet it does not appear that the custom was in issue. So that we can have no certain information of the custom by this verdict. *Et adjornatur.*

Precedents were ordered to be searched; and afterwards, in Hilary

[1] 20 Hen. VII. 1. [2] Vide 21 Hen. VII.

term,[1] it was moved again, and precedents shown, that by the opinion of Chief Justice ——— debt lay not; and all the clerks in Guild Hall certified that they had no precedent in London of debt in such case.[2]

[1] 20 Car. II.

[2] Vanheath *v.* Turner, Winch, 24. [Michaelmas Term, 1622. Peter Vanheath brought an action against Turner, and declared, upon the custom of merchants, that if any merchant over the sea deliver money to a factor, and make a bill of exchange under his seal, and this is subscribed by the merchant, or by any of the company of such merchants, that the merchant himself, or all the company, or any one in particular, may be charged to pay that; and he showed that one Morgan was factor of the company of which the defendant was one; and that the said Morgan did substitute one Greenway, to whom the plaintiff delivered £100 upon a bill of exchange to which bill one Bounder, being one of the company, set to his hand in Engla.. d and so the action accrued to the plaintiff.

The defendant pleaded *nihil debet per legem*, and upon that the plaintiff demurred in law; and the question was whether the defendant may wage his law; and it was argued by Serjeant *Harvey* that he shall not wage his law, for this is only an action upon the case, and sounds only in *nonfeasance*, and here is no privity between the plaintiff and defendant; for the bill was made over the sea, and subscribed here in England, and he shall not charge the defendant without a special custom; so that it is plain that it is custom which made the defendant liable; and, if the defendant do not pay for this, no action of debt lies, but only an action upon the case; and every plea ought to conclude to the point in action, and for that, in trover and conversion, *non culp.* is a good plea. And yet he may traverse the finding, for this tends to the issue, and is good; and so, in debt upon a lease for years, *nihil debet* is a good plea, or *non dimisit*, for the cause aforesaid; but when the plea doth not tend to the point in issue, it is otherwise, for he ought to traverse that which tends to the point in issue; and in our case the defendant may traverse the custom, or give answer to the *nonfeasance*, but he shall not wage his law; and an action lies upon this contract against the merchant for this. And so he concluded that judgment ought to be given for the plaintiff.

Harris, Serjt., contrary. This non-payment is not a *nonfeasance* in the defendant; and here the defendant may not plead not guilty or *non assumpsit*, for no promise was made. And it is a general rule in law, that where a man may traverse the conveyance, there he shall not wage his law. See 5 Hen. VII. But here the defendant may not traverse the conveyance. *Ergo*, he may wage his law; and, 5 Hen. VII., the successor of an abbot shall have his law of a contract made with his predecessor, and he said that the book of the 28 Edw. III. is not law. HOBART, C. J.: If the bailiff at the common law make a substitute, the substitute is not chargeable, but here the custom will bind the law. Secondly, he said, two or three merchants trade over the sea who made a factor there, who takes money there, and gives a bill, and this is subscribed by one of the company, that this should bind all or any of the company is not a good custom; and the custom of merchants is part of the common law of this kingdom, of which the judges ought to take notice; and, if any doubt arise to them about their custom, they may send for the merchants to know their custom, as they may send for the civilians to know their law, and he thought that the defendant ought to be admitted to wage his law, for the delivery of the money made a contract in law; and as he may have an action of debt, so, without question, he may have an action upon the case, and so count upon a promise; and then the defendant may not wage his law.] Molloy, bk. 2, c. 10, § 19, s. c. — ED.

Afterwards, in Hilary term,[1] the court declared their opinions that an action of debt would not lie upon a bill of exchange accepted against the acceptor, but that a special action upon the case must be brought against him. For that the acceptance does not create a duty, no more than a promise made by a stranger to pay, &c., if the creditor will forbear his debt. And he that drew the bill continues debtor, notwithstanding the acceptance, which makes the acceptor liable to pay it. And this course of accepting bills being a general custom amongst all traders both within and without the realm, and having everywhere that effect, as to make the acceptor subject to pay the contents, the court must take notice of that custom; but the custom does not extend so far as to create a debt, only makes the acceptor *onerabilis* to pay the money. Though custom may give an action of debt, as in 20 Hen. VII. 1, of toll; and so in case of a fine for a copyhold.

Wherefore, and because no precedent could be produced, that an action of debt had been brought upon an accepted bill of exchange,

Judgment was arrested.[2]

[1] 20 & 21 Car. II.

[2] Brown *v.* London, 1 Vent. 152. [Michaelmas Term, 1670. In an action upon the case, the plaintiff declared upon the custom of merchants that J. S. drew a bill of exchange upon the defendant, to pay to the plaintiff, which he accepted, and had not paid him.

And declared further *sur indebitatus* upon such a sum; for that the defendant accepted a bill of exchange from him, &c.

Upon *non assumpsit*, a verdict was found for the plaintiff, and entire damages given.

And it was moved, in arrest of judgment, that an *assumpsit sur indebitatus* did not lie upon this matter, but only an action upon the case, as it was said in the first part of the declaration, where the custom of merchants is set forth, and that the defendant, by reason thereof, is chargeable; and this is not to be involved in a general *indebitatus assumpsit*.

And of that opinion were HALE and RAINSFORD, who said it had been so adjudged in the Exchequer since the king's return.

But they said if A delivers money to B to pay to C, and gives C a bill of exchange drawn upon B, and B accepts the bill, and doth not pay it, C may bring an *indebitatus assumpsit* against B, as having received money to his use. But then he must not declare only upon a bill of exchange accepted, as the case at bar is.

So by their opinions the judgment was stayed, *hæsitante* Twisden; for he conceived that the custom made it a duty for him that accepted the bill.] 1 Mod. 285; 1 Lev. 298; 2 Keb. 695, 713, 758, 822, s. c.

See Webb *v.* Geddes, 1 Taunt. 540; Lindo *v.* Gardner, 1 Cranch, 343; Wilson *v.* Crowdhill, 2 Munf. 302; Smith *v.* Segar, 3 Hen. & Munf. 394. — ED.

STARKE v. CHEESEMAN.

In the King's Bench, Hilary Term, 1700.

[*Reported in Lord Raymond*, 538.[1]]

In an action upon the case upon a bill of exchange, the plaintiff, in his declaration, declared upon a bill of exchange, and that he offered it to the person upon whom it was drawn; and he refused to pay it, *per quod* the first drawer *devenit onerabilis per consuetudinem*, &c., and there was an *indebitatus assumpsit*, and a *quantum meruit*, in the declaration. Judgment by default, and a writ of inquiry of damages, and entire damages given. And now it was moved in arrest of judgment that, as the matter stood upon the first count, this action was founded upon a deceipt, the bill not being paid according to the warranty, every one who draws a bill warranting the payment of it; and therefore being in the nature of an action for a deceipt, which is a tort, it cannot be joined with an assumpsit, which is founded upon a contract; and, therefore, for want of laying an express promise, it was ill, entire damages being given. Northey said that the action was founded upon the custom, and that the obligation arose by that, and therefore the action is maintainable, without showing a promise. Cro. Car. 302. A declaration upon a bill of exchange, without showing any promise, and the roll is so. 2. This sounds all in contract, for the custom raises a promise in law, that the drawer will pay the money, if the person upon whom it was drawn refuses to pay it. And 2 Cro. 307, says that, if a merchant accepts a bill, it has by the custom the force of a promise, to compel him to pay the money.

Holt, C. J., at the beginning, seemed to agree with the objection, and said that he who draws the bill warrants the payment of it, and, if he does not, it is a deceipt, and one may have an action upon it; but then they ought not to join it with an action upon a promise. That is the reason of the case of Sir John Dalston and Janson, Mich. 7 Will. III., B. R. *ante*, 58. In the time of 2 Cro. they were not arrived at way of declaring upon bills of exchange.

Gould, J., cited 1 Sid. 306, that if a man brings assumpsit for the arrears of an account, where the action formed is debt, he ought to lay an express promise to maintain the action.

Holt, C. J., said that the notion of promises in law was a metaphysical

[1] Carth. 509; 1 Salk. 128, s. c. — Ed.

notion, for the law makes no promise, but where there is a promise of the party. Afterwards, in this term, judgment was given for the plaintiff, because the drawing of the bill was an actual promise.

Ex relatione m'ri Jacob.[1]

CLERKE *v.* MARTIN.

In the Queen's Bench, Easter Term, 1703.

[*Reported in* 2 *Lord Raymond*, 757.]

The plaintiff brought an action upon his case against the defendant upon several promises: one count was upon a general *indebitatus assumpsit* for money lent to the defendant; another count was upon the custom of merchants, as upon a bill of exchange, and showed that the defendant gave a note subscribed by himself, by which he promised to pay —— to the plaintiff or his order. Upon *non assumpsit*, a verdict was given for the plaintiff, and entire damages. And it was moved, in arrest of judgment, that this note was not a bill of exchange within the custom of merchants, and therefore the plaintiff, having declared upon it as such, was wrong; but that the proper way in such cases is to declare upon a general *indebitatus assumpsit* for money lent, and the note would be good evidence of it. But it was

[1] Wegersloffe *v.* Keene, 1 Stra. 214, 224; Griffith *v.* Roxbrough, 2 M. & W. 734; Donaldson *v.* Thompson, 6 M. & W. 816, *accord*.

In Donaldson *v.* Thompson, *supra*, Parke, B., said, p. 819: "This is an action by the indorsee against the maker of a promissory note; and, on referring to Bayley on Bills, I find it is unnecessary to allege any promise, as the promise is always implied by law." But a count in *assumpsit* against a drawer, in which the promise implied by law was not stated, was, in England, insufficient on a special demurrer. Henry *v.* Burbidge, 8 B. N. C. 501.

By Regulæ Generales, Hilary Term, 4 Will. IV., Pleadings in Particular Actions, I. 2, it is provided that: "In all actions upon bills of exchange and promissory notes, the plea of *non assumpsit* shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *e. g.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonor of the bill or note." And by the Common-Law Procedure Act, 15 & 16 Vict. c. 71, § 49, all immaterial and fictitious statements in pleadings are prohibited, such as "the statement of promises which need not be proved."

In the United States, a curious distinction has obtained in regard to declarations in assumpsit upon bills and notes. In counts against a drawer, acceptor, or indorser, it has been the practice to lay the promise implied by law; but, in counts against the maker, the implied promise is omitted, on the theory, apparently, that the express promise stated in describing the note is sufficient, although no consideration for it is averred. Am. Prec. (4th ed.) 249, 250, 260, 261. — Ed.

argued by Sir Bartholomew Shower, the last Michaelmas term, for the plaintiff, that this note, being payable to the plaintiff or his order, was a bill of exchange, inasmuch as by its nature it was negotiable; and that distinguishes it from a note payable to J. S. or bearer, which he admitted was not a bill of exchange, because it is not assignable nor indorsable by the intent of the subscriber, and consequently not negotiable, and therefore it cannot be a bill of exchange, because it is incident to the nature of a bill of exchange to be negotiable; but here this bill is negotiable, for if it had been indorsed payable to J. N., J. N. might have brought his action upon it as upon a bill of exchange, and might have declared upon the custom of merchants. Why, then, should it not be before such indorsement a bill of exchange to the plaintiff himself; since the defendant, by his subscription, has shown his intent to be liable to the payment of this money to the plaintiff or his order; and since he hath thereby agreed that it shall be assignable over, which is by consequence that it shall be a bill of exchange? That there is no difference in reason between a note which saith, "I promise to pay to J. S. or order, &c.," and a note which saith, "I pray you to pay to J. S. or order, &c.," they are both equally negotiable; and to make such a note a bill of exchange can be no wrong to the defendant, because he, by the signing of the note, has made himself to that purpose a merchant, and has given his consent that his note shall be negotiated, and thereby has subjected himself to the law of merchants.

HOLT, C. J., was *totis viribus* against the action, and said that this note could not be a bill of exchange. That the maintaining of these actions upon such notes were innovations upon the rules of the common law; and that it amounted to the setting up a new sort of specialty, unknown to the common law, and invented in Lombard Street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them, and since there was so easy a method, as to declare upon a general *indebitatus assumpsit* for money lent, &c. As to the case of Sarsfield *v.* Witherly, he said, he was not satisfied with the judgment of the King's Bench, and that he advised the bringing of a writ of error.

GOULD, J., said that he did not remember it had ever been adjudged that a note, in which the subscriber promised to pay, &c., to J. S. or bearer, was not a bill of exchange. That the bearer could not sue an action upon such a note in his own name, is without doubt and so it was resolved between Horton and Coggs, now printed in 3 Lev. 299; but that it was never resolved that the party himself (to

whom such note was payable) could not have an action upon the custom of merchants upon such a bill.

But HOLT, C. J., answered that it was held in the said case of Horton v. Coggs that such a note was not a bill of exchange within the custom of merchants. And afterwards, in this Easter term, it was moved again, and the court continued to be of opinion against the action. And then Mr. Branthwaite, for the plaintiff, urged that, if this note was not a bill of exchange within the custom of merchants, then the promise founded upon it was void; and then it could not be intended that any damage was given by the jury for the breach of it, but all the damages must be intended to have been given upon the general *indebitatus assumpsit.*

HOLT, C. J., said that would be true, if it had been void by reason of its being insensible; but this matter is sensible enough, though not sufficient in law to raise a promise, and therefore one cannot intend but that damages were given for it, and consequently that judgment must be arrested. And judgment was given, *quod querens nil capiat per billam*, &c., by the opinion of the whole court.[1]

SIMMONDS v. PARMINTER AND BARROW.

IN THE KING'S BENCH, HILARY TERM, 1741.

[*Reported in* 1 *Wilson*, 185.]

THIS is an action upon the case upon several promises made by the defendants jointly, who have pleaded several pleas; and upon this record two issues are joined, one upon a demurrer in law, the other upon *nul tiel record:* the demurrer has been argued, and judgment thereupon is entered for the plaintiff; also a writ of inquiry of damages has been executed, entire damages given for the plaintiff upon

[1] Williams v. Cutting, 2 Ld. Raym. 825; Potter v. Pearson, 2 Ld. Raym. 759; Burton v. Souter, 2 Ld. Raym. 774, *accord.*

In Williams v. Cutting, *supra*, Holt, C. J., said: "As to the question whether the declaration on the note could be supported, that he had proposed it to all the judges, and that they were all of opinion that a declaration upon the custom of merchants upon a note subscribed by the defendant to the plaintiff for so much money, or promising so much money, was void, for it tended to make a note amount to a specialty." In Potter v. Pearson, *supra*, the court said that the alleged custom by which the maker of a promissory note was bound to pay it was a "void custom, since it binds a man to pay money without any consideration." Conf. Carter v. Palmer, 12 Mod. 380. — ED.

all the counts generally, but nothing appears to be done upon the issue of *nul tiel record.*

Sir Thomas Bootle, for the defendants, in arrest of judgment. This declaration contains several counts; and general damages being assessed upon the whole declaration, if any one count therein be bad, the judgment must be arrested. My objection is to the sixth count, which is laid in this manner; viz., that the plaintiff, on the 28th of June, 1739, at such a place, according to the custom and usage of merchants, made his certain bill of exchange in writing, and directed it to the defendants, then at Bilboa in Spain, and thereby requested them at usance to pay that his first bill of exchange in Spain to the order of John Evangelist Cleere & Co., $4,000 in gold or silver, as to the exchange known to them that day value in account with the said gentlemen, as by advice, which bill the defendants accepted, according to the usage and custom of merchants; and the plaintiff in fact saith that the usance between London and Madrid, time out of mind, had been at two months, and that the defendants did not pay to the said John Evangelist Cleere & Co., or order, the contents of the said bill, but refused to pay the same; whereupon, afterwards, upon the 21st of September, 1739, the said John Evangelist Cleere (having made no order concerning the payment thereof) protested the said bill at Madrid, according to the custom and usage of merchants upon such non-payment; by reason whereof, the plaintiff, according to the usage and custom of merchants, became liable to pay to the said John Evangelist Cleere the contents of the bill, together with the interest, exchange, and re-exchange, and damages, which should accrue from the delay of payment thereof; and, being so liable, he, the said plaintiff, afterwards, on the 1st of January, 1739, paid to the said John Evangelist Cleere the contents of the said bill, and also £36 15*s.* for the interest, exchange and re-exchange, costs and damages, which did accrue from the delay, whereof the defendant afterwards, on the 15th of January, 1739, had notice. By reason of the premises, and by force of the usage and custom of merchants, the defendants became liable to pay the plaintiff the contents of the said bill and the said sum of £36 15*s.*, and, being so liable, promised payment when requested.

My objection is, that a drawee who accepts a bill of exchange, and afterwards refuses to pay it to the payee, is not liable to the drawer, although it must be admitted he is liable to the drawee [payee ?] or his indorsee upon the acceptance thereof; and there is no such custom and usage among merchants as is set out in this count; or, if there be any such custom, it is unreasonable and void: but, if there be any such custom, it lies upon the plaintiff to show it, for I cannot find any such in any book that I have read; and, if ever there was such a custom, it must

have been taken notice of by some mercantile author or other; and I never knew an action by the drawer against the drawee of a bill, unless it came back to him again by being indorsed to him. See Bac. Abr. 614.

Actions upon bills of exchange are grounded upon the custom of merchants, for debt will not lie for the drawee [payee?] against the acceptor of a bill, because it depends upon a particular custom, and is not founded in contract. Neither will an *indebitatus assumpsit* lie thereupon. 1 Mod. 285, 286; Salk. 125, s. p.

Poole, Serjt., of the same side, for the defendant. 1. There is no such custom. If there is, they must show it out of some book of authority or the court will not intend there is any such. Before the statute of Queen Anne for making notes of hand negotiable like bills of exchange, an action was brought upon a note indorsed; and in the declaration it was laid that the defendant, according to the custom of merchants, was liable; and, in arrest of judgment, it was moved that there was no such custom; and, if so, there was no consideration for the promise. Holt, C. J., held the declaration ill, and said the court could not intend any such custom. And in the present case the demurrer does not confess any such custom as is laid, for there is no special custom set forth.

2. The custom contended for would be unreasonable, if there was any such, and therefore void; for, from the very nature of the transaction, the drawer is the debtor, and by his draught acknowledges so much money is owing by him to the payee, and the defendants, the drawees, only come in in aid of him. And it may be compared to this case: viz., A owes B £20; B requires it of A, who tells him, if you will go to C, he will undertake to pay it for me. B goes to C accordingly, who undertakes to pay it in two months: at the end of that time, B demands it of C, according to C's promise, when C tells him that A is now able to pay him, and so he goes to A, who pays him his own debt. Is there any reason in the world that A shall come upon C to be repaid the £20, which was originally A's own debt, due from him to B, and C was only to come in in aid of A? There is no difference between this and the case at bar; and, if the drawee accepts a bill and pays it, it is *prima facie* evidence of a debt due to him from the drawer. *Vide* Lucas's Rep. in Lord Macclesfield's time.

Mr Banks, for the plaintiff. A bill returned protested for non-paym:nt, being once satisfied by the drawer to the deliverer, the drawer is discharged, and so is the acceptor as to him to whom the moneys were paid; but the acceptor, by virtue of his acceptance, makes himself debtor, according to the custom of merchants, to the drawer. Molloy, De Jure Maritimo, lib. 2, § 35, fol. 306, ed. 6.

Draper, Serjt., for the plaintiff. When a merchant draws a bill, he thereby acknowledges himself to be indebted to whom it is payable; so the drawee, by accepting such bill, owns himself indebted to the drawer. If I draw a bill upon a man, payable to myself or order, and he accepts it, he thereby acknowledgeth that he owes me so much money as the bill is for. Salk. 130. And so was the case of Rawlinson *v.* Stone lately.

This is a contract between the drawer and acceptor, the meaning whereof is this: "I desire you to pay so much money to my order, and that shall be your discharge;" which, by underwriting the bill, the drawee agrees to, and the money must be first demanded of the acceptor before the drawer be liable to the payee. 1 Salk. 127, 131. The acceptor is liable to whatever indorsee the bill comes. Death *v.* Serwonters. If the drawee refuses to accept a bill, it is *nudum pactum* between him and the drawer; but, if he does accept it, it becomes a debt *ex quasi contractu*. The acceptance of a bill of exchange is a trust; and, if a man accepts a trust, he is bound to perform. 1 Salk. 26; Coggs *v.* Bernard. *Et vide* Justin. Inst. lib. 3, tit. *De obligationibus quæ quasi ex contractu nascuntur*, and tit. *De gestu negotiorum*, Ibid.

Mr. Norton, for the plaintiff. The principal matter in this case, and upon which the whole must turn, is whether here is not a good consideration for the promise laid in this count; and I agree, if there is not, the plaintiff cannot have judgment. It is certain the defendant has accepted the bill, and as certain that he has not paid it, whereby, and by the custom, &c., the plaintiff has been obliged to pay the bill, with interest, exchange, and charges of protesting. The defendant has not protested the bill as accepted by him for the honor of the drawer, and therefore, according to the usual practice of merchants, it must be intended he accepted it, because he had effects of the drawer in his hands. *Vide* Molloy, 299, the nature of an acceptance for the honor of the drawer. Smith *v.* Abbott, where the defendant accepted a bill of exchange to pay it when the goods consigned to him were sold, and held that it was a good acceptance, and bound him when the goods were sold; and Lee, C. J., when he gave judgment in Smith *v.* Abbott, cited Salk. 129; Molloy, 304. And if an acceptor do accept a bill generally when he has no effects of the drawer in his hands, it is his own folly, because he might have accepted it conditionally.

A bill once accepted cannot be revoked by the party who accepted it. Molloy, 303, 6th ed. The reason is, because by the acceptance he confesses himself indebted to the drawer. *Vide* Bac. Abr. 612.

It is objected that the acceptor, having paid a bill, may bring an action against the drawer for so much money paid to his use. This

may be true, if the balance of account is not on the drawer's side, but the court will now intend that it was proved to the jury that the defendant had effects of the plaintiff in his hands.

Sir Thomas Bootle, for the defendant, in reply. My objection is singly this, which has not been answered, that the law never allowed this to be a custom; but it is said the payee having paid the money, raises a consideration between the drawer and the acceptor, whereas the count is laid merely on the custom of merchants. The old way was to set out the custom particularly and at large; but lately it has been laid generally, because the law takes notice of the custom of merchants as part of the law of the land. The tenor of the bill is to pay it to the payee, and not to the drawer.

LEE, C. J. This count is laid upon the express promise of the defendant.

Bootle. The promise is not necessary to be laid in an action on a bill of exchange, because the action is not founded in contract, but upon the custom. Starkey *v.* Cheeseman. It is laid that, by reason of the premises and the custom, the defendant became liable and promised.

LEE, C. J. The count says that the defendant accepted the bill, and became liable by the custom, and, being so liable, neglected payment, and thereby the plaintiff was obliged to pay it, and did pay it: by reason of which premises and the custom, the defendant became liable, and so promised to pay the plaintiff. This seems to me, as at present advised, to be a good consideration to raise the promise.

Poole, Serjt., in reply. The gist of this action is the custom of merchants; and there is nothing disclosed in the declaration that the acceptor requested the drawer to pay the payee, by reason of the premises, &c. The word "premises" relates only to the matter of fact, and the custom is what is relied upon in the count. What is said in Molloy, 306, is a mere *dictum* of the author, for there never was a case like this.

The whole court seemed to be of opinion for the plaintiff, and, after time taken to consider, overruled all the exceptions taken by the defendant. They said the acceptor had made himself liable to the drawer as well as to the payee, and to every indorsee to whom the payee should transfer the bill. And judgment was afterwards given for the plaintiff, and upon a writ of error was affirmed in the House of Lords.[1]

[1] Cowley *v.* Dunlop, 7 T. R. 565, 572; Kinney *v.* Heald, 17 Ark. 897; Pilkington *v.* Woods, 10 Ind. 432; Wiggle *v.* Thomason, 19 Miss. 452; Drew *v.* Phelps, 18 N. H. 572; Kingman *v.* Hotaling, 25 Wend. 423; Smith *v.* Bryan, 11 Ired. 418 (*semble*); Zebley *v.*

BISHOP v. YOUNG.

In the Common Pleas, February 4, 1800.

[*Reported in* 2 *Bosanquet & Puller*, 78.]

Debt on a promissory note. The first count of the declaration was: "For that whereas the defendant, on, &c., at, &c., made his certain note in writing, commonly called a promissory note, with his own proper hand thereunto subscribed, bearing date the same day and year aforesaid; and then and there delivered the said note to the plaintiff, by which said note the defendant, one month after date, promised to pay to the plaintiff, or order, £8, value received in goods by him, the defendant; by reason whereof, and by force of the statute in that case made and provided, the defendant became liable to pay to the plaintiff the said sum of money in the said note mentioned, whereby an action hath accrued," &c. There were other counts in debt for money lent, money had and received, and an account stated, and the common conclusion.

To the first count there was a special demurrer; but, as the cause assigned was afterwards removed by an amendment, the case was now argued as upon a general demurrer.

Marshall, Serjt., in support of the demurrer. The question is whether debt will lie by the payee of a promissory note against the drawer. The court will not incline to encourage the practice of bringing debt upon simple contract, since that practice subjects the defendant to serious inconvenience. In case he suffer judgment by default, he is liable to execution for whatever sum the plaintiff may choose to lay in the declaration; and he has no other mode of preventing that execution than by pleading and going down to trial. The question on this demurrer was expressly decided in Welch *v.* Craig,[1] where the

Voisin, 7 Barr, 527; Coursin *v.* Ledlie, 31 Pa. 506; Henneman *v.* Thomson, 8 S. Ca. N. s. 115, *accord.*

But see 1 Wentworth's Prec. 228, 230.

An accommodation acceptor, who has taken up a bill, of course cannot sue the drawer upon the bill, but only upon a contract of indemnity. Griffith *v.* Reed, 21 Wend. 502; Suydam *v.* Westfall, 2 Den. 205; 4 Hill, 211, s. c.; Wing *v.* Terry, 5 Hill, 160, Wright *v.* Garlinghouse, 26 N. Y. 539; 27 Barb. 474, s. c.; Nelson *v.* Richardson, 4 Sneed, 307; Planters' Bank *v.* Douglass, 2 Head, 699; Stark *v.* Alfred (Texas, 1878), 5 Reporter, 218. — Ed.

[1] 8 Mod. 373. [Hilary Term, 1724. In an action of debt on a promissory note the defendant demurred to the declaration.

The question was, whether the action of debt would lie.

It was said that it would not lie against the indorser, but that it would lie against the drawer. 1 Mod. Ent. 312; Morg. Prec. 348. By the statute 3 & 4 Anne, c. 9, it is

court were clearly of opinion that no action of debt would lie on a promissory note.

Bailey, Serjt., *contra*. It is a general principle that, where a man enters into a contract on a sufficient consideration for the payment of a sum of money, the party with whom the contract was made may maintain an action of debt thereon. On this principle it is that actions on simple contract or on specialty equally proceed. Lord Chief Baron Comyns introduces his title of "Debt on Contract" by saying, "Debt lies upon every express contract to pay a sum certain."[1] And if debt cannot be maintained by the payee of a promissory note against the maker, it certainly is the only case of an express contract where it cannot. To found the action of debt, there must indeed be a sufficient consideration. In some cases, the consideration must be averred; in others, it is implied from the instrument itself. In simple contract, generally speaking, it must be averred, and in that respect there is no distinction between debt and assumpsit; whether the averment be necessary or not, depends upon the nature of the contract, not upon the form of action. Where the contract is founded on specialty, the consideration is implied. Therefore, in covenant for payment of a sum certain, or in debt on bond, the consideration need not

enacted "that all notes signed by any person promising to pay to another, or order, or bearer, the money mentioned in such note, shall be construed to be due and payable to such person to whom it is made payable." But, though it is due and payable to the person, a general *indebitatus assumpsit* will not lie for it, for want of a consideration; for a bill of exchange is only an evidence of a promise to pay, and is no more than *nudum pactum;* but a general *indebitatus assumpsit* will lie against the drawer, not upon the custom of merchants, but for so much money received to the plaintiff's use, and the plaintiff may give the note in evidence.

The court were clearly of opinion that no action of debt would lie on a promissory note, declaring thereon; but the plaintiff might have brought an *indebitatus assumpsit*, declaring generally, and so have given the note in evidence. By the custom of merchants, no remedy was given on foreign bills of exchange but by action on the case. The statute of 9 & 10 Wm. III. c. 17, has given the same remedy to inland bills, and the 3 & 4 Anne, c. 9, to promissory notes. An *indebitatus assumpsit* will not lie on a bill of exchange.

The court, however, gave the plaintiff leave to discontinue, on payment of costs.]

2 Stra. 680, s. c. [Hilary Term, 1726. Debt upon two promissory notes and a *mutuatus*. And, on demurrer to the declaration, I objected that an action of debt would not lie; that before the statute no action at all lay upon the note, as a note, Salk. 129; nor did an *indebitatus assumpsit* lie on a bill of exchange. And the only remedy given upon the note by the statute is the same that was before on an inland bill of exchange. And of this opinion was the court, and pronounced judgment for the defendant. But then it was observed by Sergeant J. Comyns, for the plaintiff that there was one good count upon the *mutuatus*, and the demurrer was to the whole Whereupon, judgment was given for the plaintiff, which I believe it will be difficult for him to enter, so as to maintain it.] — Ed.

[1] Com. Dig. tit. Debt (A. 8).

be averred. There are certain privileges peculiar to a bill of exchange. 1. Although a *chose in action*, it may be assigned, and the assignee may maintain an action thereon; 2. Though a simple contract, the consideration is implied from the nature of the instrument. Even in assumpsit therefore on a bill of exchange, the consideration is never stated. It appears from the cases of Clerke v. Martin and Potter v. Pearson, which were before the statute 3 & 4 Anne, c. 9, that the only objection then made to declaring upon a promissory note was that they did not imply a consideration, though bills of exchange did. Then came the statute of Anne, the effect of which was to put promissory notes upon the same footing with bills of exchange. The case of Rumball v. Ball[1] came before the court soon after the passing of that statute. That was debt upon a promissory note. No objection was taken to the form of the action; and the plaintiff was allowed to recover. And in 1 Mod. Entr. 312, pl. 13,[2] it is said: "In an action of debt on a promissory note, the defendant demurred to the declaration, and the question was, whether an action of debt would lie. It was said that it would not lie against the indorser, but that it would lie against the drawer." With respect to the case of Welch v. Craig, it is not expressly stated in either of the reports against which of the parties to the note the action was brought. But it may be observed that the counsel, in support of the demurrer, insisted on this distinction, that debt would not lie against the indorser, though it would against the drawer; which shows that the action in that case was not brought against the maker, and affords ground to infer the prevailing opinion of the time, that if it had been brought against him it might have been supported. The undertaking of the maker differs substantially from that of the indorser; since the former undertakes to pay absolutely, whereas the latter only undertakes to pay upon the default of the maker. Between the payee and the maker, there is a privity of contract; and the ground on which it was held in Milton's Case, that debt would not lie against the acceptor of a bill of exchange, was that his contract was collateral, admitting that it would lie against the drawer. The case of Rudder v. Price[3] was debt on a promissory note payable by instalments, and the declaration was demurred to by Mr. Justice Lawrence, then at the bar, because it appeared that the last instalment was not

[1] 10 Mod. 38.

[2] In the same page, however, pl. 14, it is observed that the words of the statute of 3 Anne are that the party "shall recover damages, &c., which shows that an action of debt will not lie, because damages are never recovered in debt." And, in pl. 15, it is said, "An action of debt was never known to be brought on a bill of exchange or note," though it is admitted in the same *placitum* that *indebitatus assumpsit* will lie on a note, for in such case the plaintiff may recover in damages.

[3] 1 H. Bl. 547.

due. But neither at the bar or on the bench was it objected that debt was not the proper form of action, though that objection, had it been thought maintainable, would have afforded an obvious and easy answer to the plaintiff's demand. A precedent of a declaration in debt against the maker of a promissory note is to be found in Morgan's Vade Mecum, 458. The practice of dispensing with a writ of inquiry in actions of assumpsit, both on bills and notes, shows that no objection can be raised to this form of action on the ground of the defendant being deprived of the benefit of a writ of inquiry where judgment has gone by default. *Cur. adv. vult.*

On this day, the opinion of the court was delivered by

Lord Eldon, C. J. The question in this case is whether an action of debt will lie on such a promissory note as is stated in this declaration, and between such parties as the plaintiff and defendant in this suit. The defendant, by the tenor of that note, one month after date, promised to pay to the plaintiff, or order, £8, value received in goods by him, the defendant; and it is averred that the note so made was delivered to the plaintiff, being first signed by the defendant. This is a note, therefore, with a consideration apparent upon the face of it; and the action of debt is brought by the payee of that note against the person who made and signed it, not by the indorsee against the maker or the indorser. It was insisted for the defendant that, under these circumstances, the action of debt would not lie; and several cases were cited in support of that proposition. The case particularly relied upon was Welch *v.* Craig, reported in 1 Str. 680 and in 8 Mod. 373. In the former report, it is laid down generally that before the statute no action lay upon the note as a note, nor did an action of *indebitatus assumpsit* lie upon a bill of exchange. I say that it is there laid down generally; for it is not stated between what parties to the bill the action is supposed to arise. The report then proceeds, "The only remedy given upon the note by the statute is the same that was before on an inland bill of exchange." The inference, therefore, is that debt would not lie on an inland bill of exchange. From this case, as reported, we are not able to collect who the person was that brought the action, whether the payee or the indorsee, nor against whom the action was brought, whether the maker or the indorser. The doctrine is laid down without any circumstances enabling us to make a proper application of the case; and the conclusion which results from the reasoning there used is that an action of debt will not lie on a promissory note between any parties, whether there be an apparent consideration or not. But it is impossible to read the report of the same case in 8 Mod. without perceiving that we should be in great danger

of applying the case too generally if we were to hold it as clear law that without any exception an *indebitatus assumpsit* will not lie on a foreign bill, an inland bill, or a promissory note. In 8 Mod. it was argued by the counsel that debt would not lie against the indorser, but that it would lie against the drawer. We shall see presently whether there is any ground in the principles of the action of debt for that distinction. In that very argument, the reason given why a general *indebitatus assumpsit* will not lie on a promissory note is for want of consideration. The court are said to have been "clearly of opinion that no action of debt would lie on a promissory note declaring thereon," and they use these expressions: "By the custom of merchants, no remedy was given on foreign bills of exchange, but by action on the case; the statute 9 & 10 W. III. c. 17, has given the same remedy to inland bills, and the 3 & 4 Anne to promissory notes; an *indebitatus assumpsit* will not lie on a bill of exchange." According to this report, the plaintiff had leave to discontinue. It is therefore impossible for us to obtain a sight of the record and satisfy ourselves whether the action was brought by the payee against the maker, or by any other person standing in any other relation, or whether there was any apparent consideration on the face of the note. But it is observable on the two reports taken together that the reason for holding that debt would not lie was founded on the analogy of promissory notes to inland and foreign bills of exchange. If, therefore, it be true that an action of debt brought by the payee of an inland or foreign bill of exchange against the drawer of such bill will lie, it will remain to be considered whether the analogy will not require us to hold, in the case of a promissory note having an apparent consideration, that an action of debt will lie if brought by the payee of such note against the maker. The case in Hardres seems to open the principles on which this case must be decided. The effect of that case and of Pearson *v.* Garret[1] are very accurately expressed in Com. Dig. tit. Debt (B.). Lord Chief Baron Comyns, after having said that debt lies upon every express contract to pay a sum certain,[2] and also that it lies, though there be only an implied contract,[3] thus states the principles of these cases: "So debt does not lie upon a bill of exchange against the acceptor; for the acceptance binds him by the custom of merchants, but does not raise a duty.[4] So it does not lie upon a note to pay, without consideration, though alleged that it binds by custom."[5] The case in Hardres was debt against the acceptor of a bill; and the court, in declaring their opinion that the action will not lie, say, The acceptance does not create a duty, no more than a promise made by a stranger to

[1] Skin. 398.
[2] Tit. Debt (A. 8).
[3] Ibid. (A. 9).
[4] R. Hard. 485.
[5] R. Skinn. 398.

pay, &c., if the creditor will forbear his debt. And he that drew the bill continues debtor, notwithstanding the acceptance, which makes the acceptor liable to pay it." As the reasoning, therefore stated in this case against the liability of the acceptor in an action of debt is this, namely, that his situation is analogous to that of a person who takes upon himself an obligation to pay that which is not his debt, but the debt of another, it is clear that the court considered the drawer himself as owing the debt or duty, though no debt or duty were raised against the acceptor. Looking at the effect of a bill of exchange, it seems very reasonable to hold, that although the acceptor be primarily liable, yet that he is not liable for his own debt, but for that of another. The drawer holds the debt; and, if the drawee refuse to accept, an action may be immediately brought against the drawer. If the drawee does accept, the transaction amounts to no more than an undertaking on his part to pay the debt of the drawer, and on the part of the holder to resort to the acceptor, to be paid out of the effects of the drawer in his hands before he resorts to the drawer himself. With respect to promissory notes, the books say that, when they are indorsed by the payee, they resemble bills of exchange. But this is rather inaccurate with reference to the case before us. For though the payee, by making himself an indorser, assumes the character of drawer, and the maker assumes that of an acceptor to certain purposes, yet with respect to the question, Who owes the debt? where there is an apparent consideration, the person who owes the debt is still the maker of the note, as well as the drawer of the bill of exchange. Here, therefore, Lord Coke's maxim may very properly be applied, *Nullum simile est idem*. Agreeable to this is Hard's Case,[1] where it is said that *indebitatus assumpsit* will not lie against the acceptor of a bill of exchange, for his acceptance is but a collateral engagement, but that it will lie against the drawer, for he is really a debtor by the receipt of the money. So also, in Hodges v. Steward, it is allowed by the court that debt will lie against the drawer of a bill of exchange for value received; and the reason given is, "but this is for the apparent consideration." Now, in point of fact, has not this principle been applied to promissory notes where there has been an apparent consideration? In Rumball v. Ball, the plaintiff was allowed to recover in debt on a note which from its tenor was clearly a promissory note within the statute. Indeed, if it be true that an action of

[1] 1 Salk. 23. [Hilary Term, 1696. *Indebitatus assumpsit* will lie in no case but where debt lies. Therefore, it lies not upon a wager, nor upon a mutual assumpsit, nor against the acceptor of a bill of exchange; for his acceptance is but a collateral engagement. But it lies against the drawer himself, for he was really a debtor by the receipt of the money, and debt would lie against him.] — Ed.

debt will lie against the drawer of a bill of exchange in favor of the payee, it seems to me to be the necessary effect of the statute of Anne, which puts notes on the same footing with bills of exchange, that debt may be maintained by the payee of a promissory note against the maker. That statute makes a distinction between the remedies which it gives to the payees and the indorsees: it enacts that the payee may maintain an action upon the note in the same manner as he might do upon any inland bill of exchange against the person who signed the same, and that the indorsee may maintain his action either against the person who signs such note, or against any of the persons who indorse the same, in like manner as in cases of inland bills of exchange. If, therefore, he to whom a bill of exchange for value expressed is made payable may bring an action of debt against the person who signed it, it follows, from the very words of the statute, that he to whom a promissory note, having an apparent consideration, is made payable, may have the same remedy of debt against the person who signed such note. I take no further notice of the case of Rudder *v.* Price than to observe that, though it was argued for the defendant by a person of great abilities, it did not occur either to him or to the court to observe that, whether the instalments on the note were due or not, still the form of the action was misconceived.

Under these circumstances, the court is of opinion that in this particular case the action of debt may be maintained. We do not say how the case would stand if the action were brought by any other person than he to whom the note was originally given, or against any other person than him by whom it was signed and made, or if the note itself did not express a consideration upon the face of it.

Per Curiam. Judgment for the plaintiff.[1]

[1] Rumball *v.* Ball, 10 Mod. 38; Hatch *v.* Trayes, 11 A. & E. 702; Compton *v.* Taylor, 4 M. & W. 138; Gardner *v.* Clark, 1 Murphey, 283, *accord.*

In Priddy *v.* Henbrey, 1 B. & C. 674; Watson *v.* Kightley, 11 A. & E. 702; Hollingsworth *v.* Milton, 8 Leigh, 50; Regnault *v.* Hunter, 4 W. Va. 257, a payee, who was also drawer, was permitted to sue the acceptor in debt. In Hatch *v.* Trayes, *supra*, and Watson *v.* Kightley, *supra*, the doctrine of the principal case was extended to instruments which "did not express a consideration upon their face." — Ed.

EALES v. DICKER.

AT NISI PRIUS, CORAM LITTLEDALE, J., MARCH 27, 1829.

[*Reported in Moody & Malkin*, 324.]

THIS was an action by the indorsee against the acceptor of a bill of exchange, with the usual money counts.

The plaintiff was unable to proceed on the counts on the bill, on account of a variance in the mode of statement; and Follett, for the plaintiff, thereupon proposed to give the bill, which was admitted to be the defendant's acceptance, in evidence on the count for money had and received.

LITTLEDALE, J. I am decidedly of opinion that the bill is not evidence of money had and received by the acceptor to the use of the holder. I know that it has been sometimes supposed that it is so; but I think it against principle, and cannot allow it. My opinion is so decided, that I cannot grant leave to move to enter a verdict.

Evidence was then offered of admissions on the bill, as proof of an account stated, but the jury found for the defendant.

Follett, for the plaintiff.

Moody, for the defendant.

In the following Easter term, Follett obtained a rule to set aside the verdict as against evidence, which was ultimately made absolute; but no question was made of the ruling of the learned judge at the trial.[1]

[1] Gibson *v.* Minet, 1 H. Bl. 602, per Eyre, C. B.; Waynam *v.* Bend, 1 Camp. 175; Exon *v.* Russell, 4 M. & Sel. 505, 507; Bentley *v.* Northouse, M. & M. 66, *accord.*

Le Sage *v.* Johnson, Forrest, 23; Dimsdale *v.* Lanchester, 4 Esp. 201, *contra.*

The notion repudiated by Littledale, J., seems to have been founded upon a careless *dictum* by Lord Mansfield, in Grant *v.* Vaughan, *supra*, Vol. I. p. 807, that a remote holder could recover against a drawer upon a count for money had and received. Unreasoning respect for this *dictum* has produced, in this country, the utmost confusion as to the use of the money counts in actions upon bills and notes, *e. g.*: —

The mere proof of his title to the bill or note by the remote holder is held to be competent and conclusive evidence to prove any one of the three *indebitatus* counts for money lent by the holder to the defendant, money paid by the holder at the request of the defendant, or money had and received by the defendant to the use of the holder. Eagle Bank *v.* Smith, 5 Conn. 71; Johnson *v.* Stark Co., 24 Ill. 75; Howes *v.* Austin, 35 Ill. 396; Penn *v.* Flack, 3 Gill & J. 369; Wild *v.* Fisher, 4 Pick. 421; Cole *v.* Cushing, 8 Pick. 48; Ellsworth *v.* Brewer, 11 Pick. 316; Ramsdell *v.* Soule, 12 Pick. 126; Goodwin *v.* Morse, 9 Met. 278; Dowell *v.* Brown, 21 Miss. 48 (*semble*); Tenney *v.* Sanborn, 5 N. H. 557; Edgerton *v.* Brackett, 11 N. H. 218; Martin *v.* Farnum, 24 N. H. 191; Pierce *v.* Crafts, 12 Johns. 90; Murray *v.* Judah,

WATKINS v. WAKE.

IN THE EXCHEQUER, JANUARY 25, 1841.

[*Reported in* 7 *Meeson & Welsby*, 488.]

DEBT upon a bill of exchange for £40, by indorsee against his immediate indorser. General demurrer, and joinder.

G. T. White, in support of the demurrer. Debt is not maintainable against the indorser of a bill of exchange: the only remedy is by assumpsit. The promise of an indorser is not an absolute undertaking to pay the bill, but is in the nature of a collateral engagement only, to pay if the acceptor makes default. And Randall *v.* Rigby[1] is an authority to show that debt cannot be maintained on a collateral covenant. No case has yet decided that debt is maintainable by an indorsee against an indorser of a bill of exchange. In Bishop *v.* Young, it was held that debt would lie by the payee against the maker of a promissory note; and it appeared also, by the declaration, that the note was expressed to be made for value received. So, in Priddy *v.* Henbrey,[2] the action was by the drawer against the acceptor of a bill, and it was shown to have been given for value received in goods. In Hatch *v.* Trayes,[3] also, the action was by payee against maker of a note; and, in Watson *v.* Kightley,[4] by drawer against acceptor of a bill. In all these cases, the party sued was primarily liable. But debt will not lie by the indorsee against the acceptor of a bill. Cloves *v.* Williams.[5] Here the defendant is described and sued, not as a drawer, but as an indorser.

Peacock, contra. Debt will lie on a bill or note, wherever there is a privity of contract between the parties. Bishop *v.* Young, Priddy *v.* Henbrey. Therefore, on a bill payable to the order of the drawer, debt is maintainable at the suit of the first indorsee against the drawer.

6 Cow. 484; Olcott *v.* Rathbone, 5 Wend. 490; Smith *v.* Van Loan, 16 Wend. 659; Hays *v.* Phelps, 1 Sandf. 64; Chase *v.* Burnham, 13 Vt. 447; Brigham *v.* Hutchins, 27 Vt. 569; Malley *v.* Weinman, 48 Vt. 180.

Furthermore, it is held generally in the United States that a vendor who has received his customer's check or note for goods furnished may sue his customer for money lent, or money paid, or money had and received! Lane *v.* Adams, 19 Ill. 167; Fairbanks *v.* Stanley, 18 Me. 296; Payson *v.* Whitcomb, 15 Pick. 212; Goodwin *v.* Morse, 9 Met. 278; Wells *v.* Brigham, 6 Cush. 6; Smith *v.* Van Loan, 16 Wend. 659; Hughes *v.* Wheeler, 8 Cow. 77.

But see Blair *v.* Wilson, 28 Grat. 165, *contra*. — ED.

[1] 4 M. & W. 130.

[2] 1 B. & Cr. 674; 3 D. & R. 165.

[3] 3 P. & D. 408.

[4] Ibid.

[5] 3 Bing. N. C. 868; 5 Scott, 68.

Stratton v. Hill.[1] That case is expressly in point, because every indorser is in law a new drawer. The action cannot, indeed, be maintained by an indorsee against the acceptor, or against a prior indorser; because, in such case, there is no debt between the parties. But the contract of an indorser with the party to whom he indorses is not a conditional engagement to pay the acceptor's debt, but a direct contract to pay his own debt, if the acceptor do not pay for him. Any party may sue in debt the party to the bill immediately before himself, who is therefore his debtor on the bill, and against whom the bill would be evidence of an original debt due from him to the party suing, to sustain an *indebitatus* count.

White, in reply. The privity of contract, which is sufficient to enable a party to sue in debt, means a privity independent of any security; and that is the ground upon which, according to the judgment of Bayley, B., in Priddy v. Henbrey, the decision in Bishop v. Young proceeded. Where the defendant is drawer as well as indorser, he may be liable in debt, because the indorsement does not alter his original liability. But the engagement of the indorser is a merely collateral one, on the default of the acceptor, to take upon himself his debt.

Lord Abinger, C. B. The case of Stratton v. Hill is a sufficient authority to show that, where the bill has been transferred immediately from the defendant to the plaintiff, debt will lie; and, the point having been once determined, I see no reason why we should depart from that decision. The promise of the drawer, as well as of the indorser, is a conditional one to pay on the acceptor's making default; yet that case recognizes the principle that debt lies by the payee against the drawer, and the same principle applies here.

Parke, B. I have also no doubt that debt is maintainable in this case, by reason of the privity between the parties. The case of Stratton v. Hill is a precise authority in favor of the plaintiff. That case is thus explained in the judgment of the court in Priddy v. Henbrey: "The only ground upon which that decision could properly have proceeded was this, that between the immediate indorser and his indorsee there was privity. The indorsement implied that the indorser was debtor *pro tanto* to the indorsee, and that the indorsement was a contract by the indorser that that debt should be duly paid." The act of indorsement is an admission of a debt due from the indorser to his indorsee, and also implies a conditional promise to pay that debt if the acceptor do not, and upon having due notice of the dishonor of the bill. On those events occurring, it becomes an absolute debt payable

[1] 3 Price, 253; 2 Chitty, 126.

on request. The law is so laid down in Stratton v. Hill, and I think that is a just and sound principle.

ALDERSON, B. I am of the same opinion. The circumstances stated in this declaration show that, as between these parties, there is a debt of £40. *Judgment for the plaintiff.*[1]

SISON v. KIDMAN.

IN THE COMMON PLEAS, JANUARY 26, 1842.

[*Reported in* 11 *Law Journal Reports, Common Pleas*, 100.[2]]

THE plaintiff declared in debt against the defendant, as maker of a promissory note for £15, payable to the plaintiff or order, value received.

Plea: that the defendant was charged in the declaration as the principal and single party to the note, but that the note was the joint and several note of the defendant and one Watts, and that the defendant signed the note together with Watts, to secure a sum of money, which was and still is the proper debt of Watts, and that no part whatever of the said debt was the proper debt of the defendant, and that there was no consideration for the note as between the plaintiff and defendant.

Replication: that there was a sufficient consideration for the making of the said note by the defendant.

Demurrer and joinder.

This case was argued by —

Stephens, Serjt., in support of the demurrer. The question as raised in the pleadings is whether debt will lie in this case. The plea discloses facts which show that there was no consideration between these parties: there was, therefore, no privity between them. The contract was collateral.

[ERSKINE, J. On the face of the note, one maker is liable as much as the other.]

That may be so; but the plea discloses the real nature of the transaction. The defendant is not liable till Watts has first made default; and therefore, though assumpsit might be maintained, debt will not

[1] Stratton v. Hill, 3 Price, 253; 2 Chitty, 126, s. c.; Simpkins v. Pothecary, 19 L. J. Ex. 242; Sharpe v. Fowlkes, 7 Humph. 512, *accord*.

Whiting v. King, Minor, 122; Frierson v. Reeves, 7 Humph. 359, *contra*. — ED.

[2] 3 M. & Gr. 810, s. c. — ED.

lie. It was open to the defendant to show the effect and nature of the consideration in the plea. Foster v. Jolly,[1] Clarke v. Wilson,[2] Abbott v. Hendricks.[3]

[MAULE, J. How can you call the liability on the note a collateral liability?]

Because the original debt was due from another party.

[MAULE, J. Suppose the defendant had been the sole maker of the note, could you go into the nature and origin of the consideration?]

It is shown that another party was primarily liable upon it.

[TINDAL, C. J. Suppose the action had been assumpsit, would it have been any defence to show that the other party had not been sued upon it? If not, it cannot be considered as a mere guarantee.]

In Milton's Case, which was cited and relied on in the judgment in Priddy v. Henbrey,[4] it was decided that debt did not lie by the payee against the acceptor of a bill of exchange, drawn by a third person, on the ground that he that drew the bill continued the debtor; and that there was, therefore, no privity between the payee and acceptor. Here Watts continued the debtor.

[ERSKINE, J. But here you have a direct contract between the plaintiff and defendant, on the face of the note.]

So there is between the payee and acceptor of a bill of exchange.

[TINDAL, C. J. Not an original contract.]

In Randall v. Rigby,[5] lands were enfeoffed to A. B., to the use that the plaintiff and his heirs should receive and take out of them a yearly rent of £63, and the defendant covenanted with the plaintiff that A. B. should pay the said yearly rent on the days and times agreed on; and it was held that debt would not lie by the plaintiff against the defendant for the arrears of the rent.

[MAULE, J. In that case, the defendant was only to pay in default of another party. I think this case is more like that of Evans v. Jones.[6]]

The case in Siderfin, p. 402, referred to by Parke, B., in Randall v. Rigby, and also the cases of Browne v. London and Bishop v. Young, are authorities in favor of the objection.

[TINDAL, C. J. When the defendant became a party as maker to a promissory note in favor of the plaintiff, he entered into an immediate contract, which raised a privity between the plaintiff and himself, or, in other words, he took the debt on himself. I see no ground

[1] 1 Cr. M. & R. 703.
[2] 3 Mee. & Wels. 208.
[3] 1 Man. & Gr. 791.
[4] 1 B. & C. 675.
[5] 4 Mee. & Wels. 130.
[6] 5 Mee. & Wels. 295.

wnatever for holding that debt will not lie in this case; and I think that a good consideration is shown, even on the face of the plea.

The rest of the court concurring, *Judgment for the plaintiff*.[1]

[1] In Gibson v. Minet, 1 H. Bl. 602, Eyre, C. B., said: "In any other action of *assumpsit* at common law founded upon a bill of exhange [*i. e.* in any action wherein the declaration is not upon the bill itself, creating a duty by the custom of merchants] the bill is offered as evidence only of the duty. It has been expressly determined, Hodges v. Steward, that a general *indebitatus assumpsit* will not lie upon a bill of exchange; but the *indebitatus* must be for some duty, such as money lent, &c., and the bill is offered as evidence of that duty."

There would seem to be no valid reason why a general *indebitatus assumpsit* should not lie upon a bill or note. But, if such an action cannot be maintained, the rule, that *indebitatus assumpsit* will lie whenever debt will lie upon a contract not under seal, is subject to an exception in the case of actions against an accommodation party to a bill or note; for of course an action cannot be maintained, against an accommodation party upon the common money counts. Wells v. Girling, 8 Taunt. 737; 3 Moore, 79, s. c.; Page v. Bank of Alexandria, 7 Wheat. 35; Butler v. Rawson, 1 Den. 105; Balcom v. Woodruff, 7 Barb. 13; U. S. Bank v. Jackson, 9 Leigh, 221; Merchants' Bank v. Evans, 9 W. Va. 373.

A contrary view is declared in Cole v. Cushing, 8 Pick. 48; Murray v. Judah, 6 Cow. 484; Douglass v. Wilkinson, 22 Wend. 559, and Hays v. Phelps, 1 Sandf. 64, where it was held that a count in *indebitatus assumpsit* for money had and received might be maintained against an accommodation maker or drawer; but the reasoning in these cases is incomprehensible. — Ed.

RABORG AND ANOTHER v. PEYTON.

IN THE SUPREME COURT, UNITED STATES, MARCH 14, 15, 1817.

[*Reported in* 2 *Wheaton*, 385.]

ERROR to the Circuit Court for the District of Columbia.

This cause was argued by *Mr. Jones*, for the plaintiffs in error, and by *Mr. Taylor*, for the defendant in error.

MR. JUSTICE STORY delivered the opinion of the court.

This is an action of debt brought against the defendant in error, as acceptor of a bill of exchange by the plaintiffs in error as indorsees. The declaration alleges that the bill was drawn, accepted, and indorsed, for value received. The only question is, whether debt lies in such a case.

The general principle has been very correctly stated by Lord Chief Baron Comyn, that debt lies upon every express contract to pay a sum certain; and he adds, also, that it lies, though there be only an implied contract. Com. Dig. Debt, a. 8, a. 9. But it has been supposed that this principle does not apply to an action on a bill of exchange, even where the suit is brought by the payee against the acceptor, and *a fortiori* not, where it is brought by the indorsee. It is admitted that in Milton's Case the court held that debt does not lie by the payee of a bill of exchange against the acceptor. The reasons given for this opinion were, first, that there is no privity of contract between the parties; and, secondly, that an acceptance is only in the nature of a collateral promise or engagement to pay the debt of another, which does not create a duty. It is very difficult to perceive how it can be correctly affirmed that there is no privity of contract between the payee and acceptor. There is, in the very nature of the engagement, a direct and immediate contract between them. The consideration may not always, although it frequently does, arise between them; but privity of contract may exist if there be an express contract, although the consideration of the contract originated *aliunde*. Besides, if one person deliver money to another for the use of a third person, it has been settled that such a privity exists that the latter may maintain an action of debt against the bailee. Harris v. De Bervoir.[1] And it is clear that an acceptance is evidence of money had and received by the acceptor for the use of the holder. Tatlock v. Harris,[2] Vere v. Lewis.[3] It is also evidence of money paid by the

[1] Cro. Jac. 687. [2] 3 T. R. 174. [3] 3 T. R. 182.

holder to the use of the acceptor. Ibid. and Bailey on Bills, 3d edition. A privity of contract and a duty to pay would seem, in such case, to be completely established; and, wherever the common law raises a duty, debt lies. The other reason would seem not better founded. An acceptance is not a collateral engagement to pay the debt of another: it is an absolute engagement to pay the money to the holder of the bill; and the engagements of all the other parties are merely collateral. *Prima facie*, every acceptance affords a presumption of funds of the drawer in the hands of the acceptor, and is of itself an express appropriation of those funds for the use of the holder. The case may indeed be otherwise; and then the acceptor in fact pays the debt of the drawer: but, as between himself and the payee, it is not a collateral, but an original and direct undertaking. The payee accepts the acceptor as his debtor, and he cannot resort to the drawer but upon a failure of due payment of the bill. The engagement of the drawer, therefore, may more properly be termed collateral. Yet it has been held that debt will lie in favor of a payee against the drawer in case of non-payment by the acceptor. Hard's Case, Hodges *v.* Steward; and see Bishop *v.* Young.

The reasons, then, assigned for the decision in Hardres, are not satisfactory; and it deserves consideration that it was made at a time when the principles respecting mercantile contracts were not generally understood.

The old doctrine upon this subject has been very considerably shaken in modern times. An *indebitatus assumpsit* will now lie in favor of the payee against the acceptor; and it is generally true that, where such an action lies, debt will lie. And a still stronger case is that an acceptance is good evidence on a count upon an *insimul computassent* (Israel *v.* Douglas [1]), which can only be upon the footing of a privity of contract.

But the most important case is that of Bishop *v.* Young. It was there held, in opposition to what was supposed to have been the doctrine of former cases, that debt would lie by the payee of a note against the maker, where the note was expressed to be for value received. That decision was given with measured caution, and the court expressly declined to give any opinion upon any but the case in judgment. Milton's Case was there discussed, and, although its reasoning was not impugned, an authoritative weight was not attempted to be given to it. In general, the legal predicament of the maker of a note is like that of the acceptor of a bill. Each is liable to the payee for the payment of the note or bill in the first instance; and, after indorsement, each incurs the same liabilities. And, if an action of debt will lie in

[1] 1 H. Bl. 239.

favor of the payee of a note against the maker, it is not easy to perceive any sound principle upon which it ought to be denied against an acceptor of a bill. The acceptance of a bill is just as much an admission of a debt between the immediate parties as the drawing of a note.

The case has been thus far considered as if the action were brought by the payee against the acceptor. And this certainly presents the strongest view in favor of the argument. But in point of law every subsequent holder, in respect to the acceptor of a bill and the maker of a note, stands in the same predicament as the payee. An acceptance is as much evidence of money had and received by the acceptor to the use of such holder, and of money paid by such holder for the use of the acceptor, as if he were the payee. 3 T. R. 172; Id. 134; Grant v. Vaughan.

Upon the whole, we do not think that the authority in Hardres can be sustained upon principle; and we see no inconvenience in adopting a rule more consonant to the just rights of the parties as recognized in modern times. In so doing, we apply the well-settled doctrine that debt lies in every case where the common law creates a duty for the payment of money, and in every case where there is an express contract for the payment of money. We are, therefore, of opinion that debt lies upon a bill of exchange by an indorsee of the bill against the acceptor when it is expressed to be for value received. The case at bar is somewhat stronger; for the declaration expressly avers that the bill was drawn, indorsed, and accepted for value received, and the demurrer admits the truth of the averment.

This opinion must be certified to the Circuit Court of the District of Columbia.

From the view which has been taken of the case, it is unnecessary to consider whether the statute of Virginia applies to it or not.

Certificate accordingly.[1]

[1] Kirkman v. Hamilton, 6 Pet. 20; Vowell v. Alexander, 1 Cranch C. C. 83; Home v. Semple, 3 McL. 150 (*semble*); Carroll v. Meeks, 3 Port. 226; Taylor v. Walpole, 1 Blackf. 378; Willmarth v. Crawford, 10 Wend. 341; Camp v. Bank of Owego, 10 Watts, 130; Anderson v. Crockett, 6 Yerg. 330; Planters' Bank v. Tappan, 2 Humph. 96; Bank of Tennessee v. Cowan, 11 Humph. 126; Planters' Bank v. Galloway, 11 Humph. 342; Regnault v. Hunter, 4 W. Va. 257, *accord*.

Cloves v. Williams, 3 B. N. C. 868; Powell v. Ancell, 3 M. & Gr., 171, *contra* — Ed.

THE ONONDAGA COUNTY BANK *v.* BATES.

IN THE SUPREME COURT, NEW YORK, MAY, 1842.

[*Reported in* 3 *Hill*, 53.]

DEBT, tried at the Onondaga circuit, in April, 1841, before Moseley, C. J. The action was by the plaintiffs as the last indorsees, against the defendant as first indorser of a promissory note made by T. C. Bates, and payable to the order of the defendant, W. A. Bates, at the Commercial Bank, Albany. The note was indorsed by the defendant, H. Raymond, and J. G. Forbes. On the trial, after the plaintiff's counsel had proved the signatures of the maker of the note, and of the defendant as first indorser, the defendant's counsel objected that debt could not be maintained in this case. The judge overruled the objection, and the defendant's counsel excepted.[1]

J. A. Spencer, for the plaintiffs.

B. D. Noxon, for the defendant.

BY THE COURT, NELSON, C. J. I think the form of action adopted was proper, and may be maintained upon principles already settled, and repeatedly acted upon by this court. In Wilmarth *v.* Crawford,[2] we held that debt would lie by an indorsee against the maker of a note, on the ground that, since the statute making promissory notes negotiable, the money payable thereby became, by virtue of the transfer, due and payable to the indorsee or holder; and that, in judgment of law, privity of contract — the absence of which has always constituted the main objection to this form of action — existed between the parties. The same general principle had been before decided in Pierce *v.* Crafts.[3] That was an action of assumpsit by the indorsee against the maker of a promissory note; and the question was, whether the note was admissible evidence under the money counts. The argument against its admission was, that *indebitatus assumpsit* would lie only in cases where debt might be brought, and that the latter could not be maintained for want of privity of contract. The court answered, that, since the statute of Anne, there was a legal privity of contract between the maker and indorsee of a negotiable note; that it was a contract on the part of the former to pay the money to whoever might become entitled to it by transfer; and that such privity commenced, by operation of the act, as soon as the bearer became so entitled. This view is equally applicable to the parties before us; for, by the indorsement,

[1] Only so much of the case is given as relates to the form of the action. — ED.

[2] 10 Wend. 348 *et seq.* [3] 12 Johns. 90.

the defendant undertakes to pay the note to the immediate indorsee, or to any other party to whom it may be transferred. On this ground, a blank indorsement may be filled up with the name of the holder, the same as if the contract had been made directly between him and the indorser; and this, though the latter be ever so remote a party. The case of Stratton v. Hill [1] was an action of debt by the first indorsee against the indorser. There, it is true, there was privity of contract in fact between the parties; but, upon the principle of Pierce v. Crafts, this privity is carried forward to any other assignee or holder.[2] See also Hodges v. Steward and Priddy v. Henbrey.[3]

[1] 3 Price, 253.
[2] Horne v. Semple, 3 McL. 150, *accord.*
Lewin v. Edward, 9 M. & W. 720, *contra.* — Ed.
[3] 1 B. & C. 674, *per* Bayley, J.

SECTION II.

None but Parties to a Bill or Note can be Parties to an Action thereon.

SIFFKIN *v.* WALKER AND ROWLESTONE.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 14, 1809.

[*Reported in* 2 *Campbell*, 308.]

ACTION on a promissory note in the following form: —

"Two months after date, I promise to pay J. Siffkin or order £300 for value received. THOS. WALKER."

The declaration stated that the defendants made their certain promissory note, which was signed by Walker for himself and Rowlestone, whereby they promised to pay, &c.

Park, in opening the case, undertook to show that the defendants were jointly indebted to the plaintiff on a charter party of affreightment, to the amount of £300, and that the note declared upon was given by Walker in satisfaction of this debt.

LORD ELLENBOROUGH. I think your remedy was either jointly against both defendants on the charter party, or separately against Walker on the promissory note. How can I say that a note made and signed by one in his own name is the note of him and another person neither mentioned nor referred to?

Park contended that the note was set out in the declaration according to its import and legal effect; that Walker had authority to bind Rowlestone for this debt, and that the presumption of law was that he had done so, although Rowlestone's name was not introduced. It was universally acknowledged that any number of partners might be bound by a note drawn in the partnership firm; and the legal consequence must be the same if a note be given for a partnership debt, whether the phrase "& Co." be employed or not.

LORD ELLENBOROUGH. The import and legal effect of a written instrument must be gathered from the terms in which it is expressed, and I must treat this note as a separate security for a joint debt.

Plaintiff nonsuited.[1]

[1] Emly *v.* Lye, 15 East, 7; *Ex parte* Emly, 1 Rose, 61; Ducarry *v.* Gill, 4 C. & P. 121; Beckham *v.* Drake, 9 M. & W. 92, 96 (*semble*); Nicholson *v.* Ricketts, 2 E. & E.

497; *In re* Adansonia Co., L. R. 9 Ch. 635 (overruling S. Ca. Bank *v.* Case, 8 B. & C 427); Dessau *v.* Bours, 1 McAll. 21, 22 (*semble*); Pease *v.* Pease, 35 Conn. 131; Graham *v.* Campbell, 56 Ga. 258; Kenyon *v.* Williams, 19 Ind. 44; Thurston *v.* Mauro, 1 Greene, 231; Arnold *v.* Stackpole, 11 Mass. 27; Bedford Co. *v.* Covell, 8 Met. 442; Fuller *v.* Hooper, 3 Gray, 341 (*semble*); Eastern R. R. *v.* Benedict, 5 Gray, 566 (*semble*); Williams *v.* Robbins, 16 Gray, 77; Slawson *v.* Loring, 5 All. 340; Brown *v.* Parker, 7 All. 337; Bartlett *v.* Tucker, 104 Mass. 339 (*semble*); Bartlett *v.* Hawley, 120 Mass. 92; Chamber *v.* Coe, 54 N. H. 561, 571 (*semble*); Minard *v.* Mead, 7 Wend. 68; Pentz *v.* Stanton, 10 Wend. 271; Rochester Bank *v.* Monteath, 1 Den. 406 (*semble*); Allen *v.* Coit, 6 Hill, 318; Rogers *v.* Coit, 6 Hill, 322; Merchants' Bank *v.* Hayes, 7 Hun, 530; Briggs *v.* Partridge, 64 N. Y. 368 (*semble*); Anderton *v.* Shoup, 17 Oh. St. 125; Collins *v.* Buckeye Co., 17 Oh. St. 215; Graeff *v.* Hitchman, 5 Watts, 454; Manuf. Bank *v.* Follett, 11 R. I. 92; Holmes *v.* Burton, 9 Vt. 252; Arnold *v.* Sprague, 34 Vt. 409; Early *v.* Wilkinson, 9 Grat. 70 (*semble*); Rand *v.* Hale, 3 W. Va. 495 (*semble*), *accord*.

Baker *v.* Gregory, 28 Ala. 544; Merchants' Bank *v.* Central Bank, 1 Ga. 418, 428; Hancock Bank *v.* Joy, 41 Me. 568; Green *v.* Skeel, 5 Th. & C. 25; Moore *v.* McClure, 8 Hun, 557; Reakert *v.* Sanford, 5 W. & S. 164 (*semble*); Leeds *v.* Vail, 15 Pa. 185 (*semble*); Sharp *v.* Bellis, 61 Pa. 69; Amison *v.* Ewing, 2 Cold. 366; Sessums *v.* Henry, 38 Tex. 37, *contra*.

Conf. Pease *v.* Pease, 35 Conn. 131; Melledge *v.* Boston Co., 5 Cush. 158; Bank of Rochester *v.* Monteath, 1 Den. 405.

In Beckham *v.* Drake, *supra*, Parke, B., after drawing the familiar distinction between an instrument under seal upon which "those parties only can sue or be sued, who are named or described in it as parties," and a simple contract in writing, "where the real principal, when disclosed, is made liable, though the contract is entered into by another," added, p. 96: "The case of bills of exchange is an exception, which stands upon the law-merchant; and promissory notes, another, for they are placed on the same footing by the Statute of Anne. In neither of these can any but the parties named in the instrument, by their name or firm, be made liable to an action upon it."

In *In re* Adansonia Co., *supra*, Sir W. M. James, L. J., said, p. 643: "Now it is the law of this country — and it has always been the law of this country — that nobody is liable upon a bill of exchange, unless his name, or the name of some partnership or body of persons, of which he is one, appears either on the face or on the back of the bill."

In the cases above cited, only the name of the agent appeared upon the instrument. But the rule of law stated in the caption of this section applies equally when the names of both principal and agent are contained in the instrument. A difficulty of interpretation may, however, arise in determining from the face of the bill or note which of the persons named is the real party thereto. In the following cases, the agent was held to be the real party: —

(*a*) As Maker. — Bottomley *v.* Fisher, 1 H. & C. 211; Price *v.* Taylor, 5 H. & N. 540; Healey *v.* Story, 3 Ex. 3; Penkivil *v.* Connell, 5 Ex. 381; Dutton *v.* Marsh, L. R. 6 Q. B. 361; Powers *v.* Briggs, 79 Ill. 493; Burlingame *v.* Brewster, 79 Ill 515; McClure *v.* Bennett, 1 Blackf. 189; Mears *v.* Graham, 8 Blackf. 144; Kendall *v.* Morton, 21 Ind. 205; Hays *v.* Crutcher, 54 Ind. 260; Bayliss *v.* Pearson, 15 Iowa, 279; Whitney *v.* Sudduth, 4 Met. (Ky.) 296; Caphart *v.* Dodd, 3 Bush, 584; Fogg *v.* Virgin, 19 Me. 352; Sturdivant *v.* Hull, 59 Me. 172; Sumwalt *v.* Ridgely, 20 Md. 107; Thacher *v.* Dinsmore, 5 Mass. 299; Forster *v.* Fuller, 6 Mass. 58; Bradlee *v.* Boston Co., 16 Pick. 347; Packard *v.* Nye, 2 Met. 47; Morell *v.* Codding, 4 All. 403; Hills *v.* Bannister, 8 Cow. 31; De Witt *v.* Walton, 5 Seld. 571; Bolles *v.* Walton, 2

KIRK v. JOHN BLURTON AND CHARLES HABERSHON.

IN THE EXCHEQUER, DECEMBER 8, 1841.

[*Reported in 9 Meeson & Welsby, 284.*]

ASSUMPSIT. The declaration stated that the defendants, by and under the name, style, and firm of John Blurton & Co., on the 12th of March, 1841, made their bill of exchange in writing, and directed the same to Messrs. Smith, Payne, & Smith, and thereby required them to pay to the order of the defendants £50, two months after date, which period had then elapsed; and the defendants then indorsed the said bill to William Unwin, who indorsed it to Andrew Duncan, who indorsed it to the plaintiff. Breach, in non-payment by Messrs. Smith, Payne, & Smith, of which the defendant had due notice.

The defendant Habershon allowed judgment to go by default. The defendant Blurton pleaded four pleas: 1st, that he did not make the bill; 2dly, that he did not indorse it; 3dly, that Blurton and Habershon were partners as printers, and that Habershon made and indorsed the bill in fraud of his partner for purposes not connected with the

E. D. Sm. 164; Titus *v.* Kyle, 10 Oh. St. 444; Pomeroy *v.* Slade, 16 Vt. 220; Early *v.* Wilkinson, 9 Grat. 68. See Drake *v.* Flewellen, 33 Ala. 106.

(*b*) As ACCEPTOR. — Thomas *v.* Bishop, 2 Stra. 955; Chiene *v.* Western Bank (Court of Session), July 20, 1848; Brown *v.* Sutherland (Court of Session), March 17, 1875.

(*c*) As DRAWER. — Leadbetter *v.* Farrow, 5 M. & Sel. 345; Newhall *v.* Dunlap, 14 Me. 180; Snow *v.* Goodrich, 14 Me. 235; Mayhew *v.* Prince, 11 Mass. 54; Bank of Br. N. Am. *v.* Hooper, 5 Gray, 567; Bass *v.* O'Brien, 12 Gray, 477.

In the following cases, the principal was held to be the real party: —

(*a*) As MAKER. — *Ex parte*, Buckley, 14 M. & W. 469; Forbes *v.* Marshall, 11 Ex. 166; Aggs *v.* Nicholson, 1 H. & N. 165; Lindus *v.* Melrose, 3 H. & N. 177; McClae *v.* Sutherland, 3 E. & B. 1; Allen *v.* Sea Fire Ins. Co., 9 C. B. 574; Alexander *v.* Sizer, L. R. 4 Ex. 102; Mechanics' Bank *v.* Bank of Columbia, 5 Wheat. 326; Roney *v.* Winter, 37 Ala. 277; Haskell *v.* Cornish, 13 Cal. 45; Shaver *v.* Ocean Co., 21 Cal. 45; Blanchard *v.* Kaull, 44 Cal. 440; Frost *v.* Wood, 2 Conn. 28; Johnson *v.* Smith, 21 Conn. 627; Tiller *v.* Spradley, 39 Ga. 35; Pearse *v.* Welborn, 42 Ind. 331; Baker *v.* Chambles, 4 Greene, 428; Atkins *v.* Brown, 59 Me. 90; Long *v.* Colburn, 11 Mass. 97; Emerson *v.* Providence Co., 12 Mass. 237; Ballou *v.* Talbot, 16 Mass. 461; Rice *v.* Gove, 22 Pick. 158; Draper *v.* Massachusetts Co., 5 All. 338; Barlow *v.* Cong. Soc'y, 8 All. 460; Whitney *v.* Stow, 111 Mass. 368; Leach *v.* Blow, 16 Miss. 221; McClellan *v.* Reynolds, 49 Mo. 312; Klostermann *v.* Loos, 58 Mo. 290; Gerver *v.* Stuart, 1 Montana, 172; Dow *v.* Moore, 47 N. H. 419; Shotwell *v.* McKown, 2 South. 828; Doty *v.* Bates, 11 Johns. 544; Rathbon *v.* Budlong, 15 Johns. 1; Staats *v.* Howlett, 4 Den. 559; Horton *v.* Garrison, 23 Barb. 176; Hood *v.* Hallenbeck, 7 Hun, 362; Robertson *v.* Pope, 1 Rich. 501; Proctor *v.* Webber, 1 D. Chip. 371. See Sanborn *v.* Neal, 4 Minn. 126; Brockway *v.* Allen, 17 Wend. 40.

(*b*) As DRAWER. — Sayre *v.* Nichols, 7 Cal. 535; Maher *v.* Overton, 9 La. 115; Milligan *v.* Lyle, 24 La. An. 144. — ED.

partnership, and that the bill was indorsed by him to Unwin, by Unwin to Duncan, and by Duncan to the plaintiff, with notice of the fraud; 4thly, that the bill was so made in fraud of Blurton, and that the same was indorsed respectively by the indorsers thereof, without value or consideration. On these pleas, issues were taken and joined.

At the trial before Lord Denman, C. J., at the last summer assizes for the county of York, the bill was produced in evidence, and was as follows:—

"SHEFFIELD, March 12, 1841.

"Two months after date, pay to our order £50, for value received.

"JOHN BLURTON & Co.

"At Messrs. Smith, Payne, & Smith's,
Bankers, London.

Indorsed: "John Blurton & Co., Wm. Unwin, Andrew Duncan."

The bill was drawn and indorsed by the defendant Habershon.

It appeared that the defendants carried on business as printers at Sheffield, under the name of "John Blurton," that being the name over the door. A witness was called, who stated that the firm had been in the habit of drawing bills, and that he had seen them, but he could not take upon himself to say whether they were in the name of "John Blurton," or of "John Blurton & Co."

Cresswell, for the defendant Blurton, objected that Habershon had no authority from Blurton to draw bills, except that which the law implied, namely, to do so in the partnership name, which was "John Blurton" only; and therefore that, this bill being drawn in the name of "John Blurton & Co.," the defendant Blurton was not liable. The learned judge, however, was of opinion that there was *prima facie* evidence of authority in either partner to draw bills in the name of "John Blurton & Co," and overruled the objection. The case then proceeded upon the question of fraud; but the jury were of opinion that no fraud was shown; and they thereupon found a verdict for the plaintiff, leave being reserved to the defendant Blurton to move to enter a verdict for him on the first and second issues.

Cresswell, in Michaelmas term, obtained a rule, accordingly, against which

Dundas and *Pashley* now showed cause. The persons composing the firm are Blurton and Habershon, and the bill is drawn in the name of "Blurton & Co.," which is sufficient to charge both. Habershon was a partner, as was proved, in the habit of drawing bills, and he had, therefore, authority to draw in the name of himself and his partner under the name of "Blurton & Co." In Faith *v.* Richmond,[1] it

[1] 11 Ad. & Ell. 33; 3 P. & D. 187.

was held that where a partner accustomed to issue notes on behalf of the firm indorses a particular note in a name differing from that of the partnership, and not previously used by the firm, which note is objected to on that account, in an action brought upon it by the indorsee, the proper question for the jury is, whether the name used, though inaccurate, substantially described the firm, or whether it so far varied that the indorser must be taken to have issued the note on his own account, and not in the exercise of his general authority as partner. Here the name used did substantially describe the firm. Williamson *v.* Johnson [1] is in point. There the declaration stated that a bill of exchange was indorsed by certain persons trading under the firm of H. & F., by procuration of J. D.; and it was held that this allegation was supported by evidence of J. D.'s handwriting, and that he, being the managing partner in a firm which carried on all its business of buying and selling under the designation of H. & F., was in the habit of indorsing bills in that manner, although there was no such person as F. in the firm, and no direct proof that the other members of it were privy to those transactions. And Holroyd, J., there intimates his opinion that evidence of J. D.'s handwriting alone, as between third persons, would have been sufficient without proof of any usage on his part to indorse bills in the manner stated. [ALDERSON, B. The learned judge says, "as between third persons;" here you seek to bind the party himself.] In Mason *v.* Rumsey,[2] the bill was drawn upon "Messrs. Rumsey & Co.," and T. Rumsey, Jr., wrote on it: "Accepted.

[1] 1 B. & Cr. 146.

[2] 1 Camp. 384. [June 27, 1808. This was an action against the defendants as acceptors of a bill of exchange.

The action was defended only by T. Rumsey, Jr., who contended he was not liable as a joint acceptor.

The bill was drawn upon "Messrs. Rumsey & Co.," and being shown to T. Rumsey, Jr., he wrote across it: "Accepted. T. Rumsey, Sen." The plaintiff's case, therefore, was that the defendants were partners, and that this acceptance bound both.

Nolan, as counsel for T. Rumsey, Jr., insisted that, even if he was a partner with his father (which was strenuously denied), this acceptance would not bind him. If a bill was drawn upon a firm, it must be accepted in the name of the firm, or by one partner for himself, and his copartners; otherwise, the holder might protest the bill, as the mere signature of a single partner was binding only upon himself. This doctrine was well known amongst merchants, and was countenanced in a treatise on bills of exchange very much respected by the profession. Chitty on Bills, 127, 2d ed. T. Rumsey, Jr., was therefore to be regarded in this transaction as merely the agent of his father, and not as himself a party to the bill.

LORD ELLENBOROUGH. There is no foundation for the doctrine contended for. This acceptance does not prove the partnership; but, if the defendants were partners, they are both bound by it. For this purpose, it would have been enough if the word "Accepted" had been written on the bill, and the effect cannot be altered by adding "T. Rumsey, Sen." If a bill of exchange is drawn upon a firm, and accepted

T. Rumsey, Sen." Lord Ellenborough ruled at Nisi Prius that both the partners were bound by this acceptance, and that ruling was confirmed by the court on motion for a new trial. So, in Lord Galway *v.* Matthew,[1] the principle was distinctly laid down, that the signature of a bill by one of several partners (presuming his authority) bound the whole firm Drake *v.* Elwyn[2] is precisely in point. There the defendant, Elwyn, and P. & S. Wittaker, were sued as partners, makers of a note. Elwyn signed the note "Elwyn & Co." A partnership was proved, but not that the defendants traded under the name of Elwyn & Co. The Supreme Court held that as such a signature imported a copartnership, and a copartnership did exist at the time between Elwyn and the other defendants, it was to be presumed that such was the name of the firm, and it was sufficient to cast upon the defendants the burden of proving what was the name of the firm, if a different name existed. In Story on Agency, § 100, n., the general principle is stated that "each partner is held out to the public as the general agent of the partnership; and consequently his acts will bind it, notwithstanding he may have violated his private instructions, or the express terms of the secret articles of partnership." They also cited Siffkin *v.* Walker and Dickinson *v.* Valpy.[3]

Creswell, contra. None of the cases cited on the other side touches the principle upon which this rule was obtained. It is obvious that no man can be bound by the acceptance or indorsement of a bill of exchange, unless it were written by himself or some other authorized by him. If an agent accept a bill for his principal, he must pursue his authority correctly. In the case of a partnership, which is only a form of principal and agent, each partner has an implied authority to bind the partnership firm by his signature to a bill, if it be necessary or incident to the dealings of the partnership to accept bills. But there is no implied authority to any partner so to bind the firm by his acceptance of a bill, except in the true style of the partnership. Then is

by one of the partners, he must be understood to exercise his power to bind his copartners, and to accept the bill according to the terms in which it is drawn.

The plaintiff had a verdict.]

Wells *v.* Masterman, 2 Esp. 731; Dolman *v.* Orchard, 2 C. & P. 104 (*semble*); Jenkins *v.* Morris, 16 M. & W. 877; Lindus *v.* Bradwell, 5 C. B. 583; May *v.* Hewitt, 33 Ala. 161; Dougal *v.* Cowles, 5 Day, 511, 515 (*semble*); Beach *v.* State Bank, 2 Ind. 488, *accord*.

Taber *v.* Cannon, 8 Met. 456; Heenan *v.* Nash, 8 Minn. 407, *contra*.

Conf. Okell *v.* Charles, 34 L. T. Rep. 822. — ED.

The effect of Mason *v.* Rumsey and the English cases, *supra*, which followed it, has been destroyed by Statute 19 & 20 Vict. c. 57, § 6, *supra*, Vol. I. p. 186, by which the acceptor's signature must appear upon the bill.

[1] 10 East, 264.

[2] 1 Cain. Amer. Rep. 184.

[3] 10 B. & Cr. 128; 5 Man. & R. 126.

there any thing in the cases cited to show that "John Blurton" and "John Blurton & Co." here mean the same thing? The former was the true style of the partnership, and in that alone had Habershon authority to sign, so as to bind his partner. Faith *v.* Richmond, if properly examined, will be found to be an authority in favor of the defendant. [He was then stopped by the court.]

ALDERSON, B. The court do not entertain any doubt as to the principle of law applicable to this case. One partner can bind his copartners only to the extent of the authority which is given to the partners generally, to enable them to carry on the partnership business together. The true principle is that which has been stated by Mr. Cresswell, that, in the case of a partnership, the authority which each partner has is an authority given by law to do such things as are necessary for carrying on the partnership. If bills are necessary, then they have a power to accept bills, and so to bind each other.[1] If there is an express contract amongst themselves different from that which the law implies, that express contract must prevail. What authority is there in a case like the present? An authority to bind the firm in the name of the partnership, and in that only. In those cases where the question has been left to the jury, it has been whether substantially there was any difference between the signature and the name of the partnership. For instance, if the signature were *Coal* & Co., and the true designation of the partnership were *Cole* & Co., it would no doubt be for the jury to say whether it was in substance the same. Upon the whole, I am of opinion that Habershon had no authority to bind Blurton, except in the partnership name, which, upon the evidence, appears to have been "John Blurton" only; and therefore the verdict on the first and second issues must be entered for the defendant.

GURNEY, B. I quite agree; and I do not see that there is any hardship on the plaintiff. He should have inquired before he took the bill.

ROLFE, B. The question would probably never have arisen if the difference between the two names had not happened to be a little less here than in some other cases. I think it would not be right to enter into the extent of the difference: it is better to adhere to the rule, that the partnership name shall in these cases be used. The law seems to be perfectly reasonable. It implies no authority to bind the partnership in any other name than that held out to the world as the name of the firm. The signature, therefore, of "John Blurton & Co." did not operate to bind the defendant Blurton.

[1] As to the authority of a member of a partnership to bind the firm by drawing, accepting, or indorsing bills, or by making or indorsing notes, see 1 Lindley, Partnership (3d ed.), 280; Story, Partnership (6th ed.), § 126. — ED.

ALDERSON, B., added that, in coming to this conclusion, the court did not mean at all to cast any doubt on the authority of the American case cited from Caines's Reports. *Rule absolute.*[1]

[1] Faith v. Richmond, 11 A. & E. 839; Cunningham v. Smithson, 12 Leigh, 82, *accord.*

See Williamson v. Johnson, 1 B. & C. 146; Norton v. Seymour, 3 C. B. 792 Maclae v. Sutherland, 3 E. & B. 35; Maynard v. Fellows, 43 N. H. 255; Drake v Elwyn, 1 Cai. 184; McGregor v. Cleveland, 5 Wend. 475. — ED.

IMPLIED AUTHORITY OF A PARTNER TO BIND HIS FIRM UPON NEGOTIABLE PAPER. — A partner has implied authority to sign the firm name to negotiable paper for partnership purposes. 1 Lindl. Partnership (4th ed.), 266; Story, Partnership (6th ed.), § 126. The authority does not exist, therefore, if the firm is not engaged in trading. Greenslade v. Dower, 7 B. & C. 635; Dickinson v. Valpy, 10 B. & C. 128; Hedley v. Bainbridge, 3 Q. B. 316; Forster v. Mackreth, L. R. 2 Ex. 163; Kimbro v. Bullitt, 22 How. 256; Hunt v. Chapin, 6 Lans. 139; Smith v. Sloan, 37 Wis. 285. Nor has a partner in a trading firm any implied authority to pledge the firm name for his individual debt. Leverson v. Lane, 13 C. B. N. S. 278; Garland v. Jacomb, L. R. 8 Ex. 216. Nor by way of accommodation. *Supra*, Vol. I. p. 741, n. 3. But a firm note given for a private debt of a partner or by way of accommodation will of course bind the firm to a purchaser for value without notice of the excess authority. Hogarth v. Latham, *supra*, Vol. I. 548; Sutton v. Gregory, Peake, N. C. 150; Chemung Bank v. Bradner, 44 N. Y. 680.

The signature should regularly be in the firm name; but a partner may also bind the firm by signing the individual names of all the partners. Galway v. Matthew, 1 Camp. 403; and although a note reading "I promise," &c., signed by two or more persons, is a joint and several note (March v. Ward, Peake, 180; Clark v. Blackstock, Holt, N. P. 474; Monson v. Drakeley, 40 Conn. 552), a note in that form bearing the signature of partners can be treated only as a joint note, if made with due authority. *Ex parte* Buckley, 14 M. & W. 469; 1 Ph. 562, S. C. If made without authority it would probably be treated as the several note of the partner who made it. See also Perrine v. Hone, 4 Bing. 28; Maclae v. Sutherland, 3 E. & B. 1. The lawful signing of the firm name will bind all the partners whether known or unknown to be such. Wintle v. Crowther, 1 Cr. & J. 316; Ontario Bank v. Hennessy, 48 N. Y. 545. If there are two firms of the same name, the members of that firm only will be bound, even to a purchaser without notice, in whose behalf the instrument was in fact signed. Hall v. West, 1 Lindl. Part. (4th ed.) 843 (overruling Baker v. Charlton, Peake, 80). So if the firm name is that of an individual, the firm will not be liable unless that name was in fact signed in behalf of the partnership, and presumptively such signature is an individual signature. Yorkshire, &c. v. Beatson, 4 C. P. D. 204; Nat. Bank v. Ingraham, 58 Barb. 290. In Swan v. Steele, 7 East, 210, a bill payable to a cotton firm composed of A, B, & C, trading under the firm name of A & B, was indorsed by a distinct grocery firm, composed of only A & B, and using the same firm name, A & B, to the plaintiff, one of the creditors of the grocery firm. It was held that C was liable to the plaintiff, although C was not known at the time of the instrument to be a member of either firm. This decision, it is submitted, was erroneous. — ED.

ALLEN GRIST AND ANOTHER v. ALLEN BACKHOUSE.

IN THE SUPREME COURT, NORTH CAROLINA, DECEMBER, 1839.

[*Reported in 4 Devereux & Battle, 362.*]

THIS was an action of debt, on a negotiable single bill, in which the plaintiffs declared as assignees of Richard Grist. Plea: the general issue.

On the trial at Craven, on the last circuit, before his Honor Judge Settle, the plaintiffs proved and read in evidence the bill upon which they declared, in the following words and figures, to wit: —

"$233.

"Ninety days after date, we jointly and severally promise to pay Richard Grist, agent of his assignees, or order, two hundred and thirty-three dollars, value received. Negotiable and payable at the Bank of New-Berne. Witness our hands and seals, July 23d, 1833.

"ALLEN BACKHOUSE. [SEAL.]
"WM. V. BARROW. [SEAL.]"

The plaintiffs then produced and read a deed of assignment to themselves of all the effects of Richard Grist, for the benefit of his creditors, which was executed before the date of the bill. There was no indorsement of the bill by the payee. Upon this evidence, the jury, under the instruction of his Honor, returned a verdict for the plaintiffs, whereupon they had judgment, and the defendant appealed.

J. H. Bryan, for the plaintiff.

Badger, for the defendant.

DANIEL, J., after stating the case as above, proceeded as follows: We are of the opinion that the evidence offered by the plaintiffs did not support their declaration; and that the judge misdirected the jury as to the law, when he told them that the plaintiffs were entitled to recover. Where a bill was made payable to A or order, to the use of B, it was held that B had but an equitable right, not a legal interest; and that he could not maintain an action on the bill against the acceptor. Evans *v.* Cramlington; 1 Leigh's N. P. 402; Byles on Bills. So, in this case, Richard Grist describing himself in the bill as the agent of his assignees did not give them the legal title to the bill.[1]

[1] Randolpl *v.* Bell, 1 M. & Sel. 715 (*semble*); United States Bank *v.* Lyman (U. S. C. Ct.), 20 Vt. 666; Moore *v.* Penn, 5 Ala. 185; Bush *v.* Peckard, 3 Harring. 385 (*semble*); Brooking *v.* Clarke, 2 Litt. 197; Turnbull *v.* Freret, 17 Mart. 703; Fuller *v.* Hooper, 8 Gray, 341 (*semble*); Fich *v.* Jacobsohn, 2 Abb. App. 132 (*semble*), *accord*. See Medway Co. *v.* Adams, 10 Mass. 360.

The counsel for the plaintiffs insist that the defendant cannot now object to this error, because there was no specific exception taken at the trial. The defendant had placed on the record his plea: it was for the plaintiffs to support the affirmative of the issue arising on that plea. The court misdirected the jury as to the law on the trial of the issue, and told them that the evidence offered was sufficient for the plaintiffs. This error appears on the record, and for that the judgment must be reversed and a new trial awarded.

Per Curiam. Judgment reversed.

THE BANK OF GENESEE *v.* THE PATCHIN BANK.

IN THE COURT OF APPEALS, NEW YORK, DECEMBER, 1855.

[*Reported in* 13 *New York Reports*, 309.]

THE action was commenced in 1853, against the Patchin Bank, as the indorser of a bill of exchange, dated Sept. 14, 1853, for $10,000, drawn by one Parsons, and addressed to R. Pomeroy, Treasurer Buffalo and New York City Railroad Company, and accepted by the

In Fuller *v.* Hooper, *supra*, Metcalf, J., said, p. 341: "The rule is general, if not universal, that neither the legal liability of an unnamed principal to be sued, nor his legal right to sue, on a negotiable instrument, can be shown by parol evidence. When an agent signs such an instrument, without disclosing his agency on its face, the holder must look to him alone. And when such an instrument, which is intended for the benefit of the principal, is given to the agent only, he only, or his indorsee, can sue on it. In other simple contracts, the rule is different." In United States Bank *v.* Lyman, *supra*, Prentiss, J., said, p. 676: "Upon the whole, it appears to me that the true rule of law, as deducible from the adjudged cases, American as well as English, is that no person, although in fact a principal or partner, can sue or be sued upon a bill or negotiable note, unless he appear upon its face to be a party to it. A promissory note, according to the expression of very great judges, partakes in some measure of the nature of a specialty, importing a consideration, and creating a debt or duty by its own proper force. Being assignable, and passing by mere indorsement, it is necessary that the parties to it should appear, and be known, by bare inspection of the writing; for it is on the credit of the names appearing upon it that it obtains circulation. It is for these qualities, and on these considerations, that it is distinguished from written simple contracts in general, and made subject to a different rule."

The undisclosed principal of the payee may sue upon a note containing no words of negotiability. Garland *v.* Reynolds, 20 Me. 45; National Ins. Co. *v.* Allen, 116 Mass. 398.

In the following cases, where the names of both principal and agent appeared upon the bill or note, the agent was held to be the real party to the instrument: Chaplin *v.* Canada, 8 Conn. 286; McConnel *v.* Thomas, 3 Ill. 313; Barnes *v.* Modisett, 3 Blackf. 253; Upton *v.* Starr, 3 Ind. 508; Shepherd *v.* Evans, 9 Ind. 260; Clap *v.* Day, 2 Greenl. 305; Whitcomb *v.* Smart, 38 Me. 264; Buck *v.* Merrick, 8 All. 123; Finn Co. *v.* Holland, 12 Mo. 127; Wheelock *v.* Wheelock, 5 Vt. 433.

In Clark *v.* Reed, 20 Miss. 554, the principal was held to be the real party. — ED.

latter for and on behalf of the railroad company. The bill was payable seventy days from date, at the Bank of Commerce in New York, "to the order of S. P. Stokes, Cas." The indorsement was as follows: "Pay B. Pringle, Esq., Pt., or order, S. P. Stokes, Cas."[1]

The action was tried at the Genesee County circuit, before Justice Marvin and a jury. The drawing and acceptance of the bill, and the fact that it was duly protested, were proved. It was also proved that the indorsement was in the handwriting of Stokes, and that he was the cashier of the Patchin Bank, a banking corporation organized under the general act and located at Buffalo. It appeared that Mr. Pringle was the president of the Bank of Genesee.

When the plaintiff rested, and again at the close of the evidence, the counsel for the defendant moved that the plaintiff be nonsuited, on the following ground, among others, that the defendant was not shown to be liable on the bill. The court refused to nonsuit the plaintiff, and the defendant's counsel excepted. A verdict was rendered by the jury against the defendant for the amount of the bill. Judgment was stayed, and the exceptions taken at the trial ordered to be heard at a general term of the court, in the first instance. The exceptions were heard at a general term of the Supreme Court in the Eighth District, and judgment rendered in favor of the plaintiff on the verdict. The defendant appealed to this court.

John L. Talcott, for the appellant.

The indorsement is not the indorsement of the Patchin Bank, even if we should assume, what is contrary to the fact, that the indorsement was in the course of the legitimate business of the bank, and by one having authority to make it. A person or corporation may indorse a bill by agent, but it must purport on the face of the bill to be the act of the principal. The addition to the signature of the person who indorses of the word "agent," "cas.," or any similar expression, is not a compliance with the rule; and in such case parol evidence cannot make it the note of the principal. Stackpole *v.* Arnold,[2] Pentz *v.* Stanton,[3] Bank of Rochester *v.* Monteath,[4] Barker *v.* The Mechanics' Fire Ins. Co.[5] This principle has been distinctly affirmed by this court in at least two cases.[6] Moss *v.* Livingston, De Witt *v.* Walton.[7] But it has been held by this court that such an indorsement may transfer the title to the bill without creating liability. Babcock *v.* Beman.

N. Hill, Jr., for the respondent.

DENIO, J. I have thus far supposed that the indorsement was in a

[1] Only so much of the case is given as relates to the form of the indorsement. — ED.

[2] 11 Mass. 27. [3] 10 Wend. 271, and cases cited.

[4] 1 Denio, 402. [5] 3 Wend. 94. [6] 4 Comst. 208.

[7] Selden's Notes, 81, April, 1854.

proper form to bind the defendant; but this is the most important and not the least difficult point in the case. The name of the defendant's corporation is not attached to the indorsement, and does not appear on any part of the bill. Assuming, as I have supposed we are warranted in doing, that the bill was sent to the plaintiff by the defendant's officers with the indorsement appearing upon it, as paper belonging to the defendant as a banking association, with a request to have it discounted for the benefit of that bank, is the form such as to bind the defendant as an indorser? The defendant's counsel relies upon the rule of law that an agent must, in order to bind his principal, contract in the principal's name and not in his own. Moss *v.* Livingston.[1] This is the general rule, but it is subject to many exceptions. It is difficult to reconcile upon principle the various cases which have been decided upon this point; but an examination of them will show that the doctrine, as I have stated it, has been broken in upon in a variety of instances. See the cases cited in the text, Notes of Story on Agency, §§ 154–162; Randall *v.* Van Vechten,[2] Brockway *v.* Allen,[3] Evans *v.* Wells,[4] Staats *v.* Howlett.[5] In most of these cases, if not in all, though the engagement purported to be that of the person signing as agent, the name of the principal appeared on some part of the instrument, and that circumstance is particularly mentioned as essential. That feature is wanting in this case; and I find some difficulty in saying that this indorsement, as it stands, can be held to be the contract of the defendant. But I am of opinion that the defendant should be held liable as indorser upon a different principle, — that of allowing the indorsement to be filled up according to the intention of the parties. In the Northampton Bank *v.* Pepoon,[6] the defendant was sued as the maker of a negotiable promissory note, which had been indorsed to and held by the Berkshire Bank; and the question was as to the transfer by that bank to the plaintiff. The indorsement was by one Learned, an attorney, with full authority from the board of directors; but the form in which it was done was by the attorney writing his own name upon the note, adding, "as attorney." The formal words of a common indorsement appear to have been in the first instance written over the name of the attorney, but the court allowed it to be altered and filled up as an indorsement by the Berkshire Bank, according to the intent. The court, Chief Justice Parker giving the opinion, upon a motion for a new trial, said: "We are all satisfied that, if the authority of Learned was good to indorse as attorney, the plaintiffs may erase the words written over his name and substitute other words which

[1] 4 Comst. 208. [2] 19 Johns. 60. [3] 17 Wend. 40.
[4] 22 Wend. 324, 335, *per* Walworth, Ch. [5] 4 Denio, 559.
[6] 11 Mass. 288.

will give effect to the indorsement." Folger v. Chase[1] presented substantially the same question. The plaintiff, in an action against the prior parties to several notes which had been indorsed to and held by the Phœnix Bank, made title to the notes by the indorsement of the cashier of that bank made in the same form with that of the bill in question, viz. "P. H. Folger, cashier." It was held that the plaintiffs were entitled to recover, the court saying: "As to the objection that the indorsement is not made in the name of the corporation, we think the indorsement by the cashier, in his official capacity, sufficiently shows that the indorsement was made in behalf of the bank; and, if that is not sufficiently certain, the plaintiffs have a right now to prefix the name of the corporation." It will not fail to be remarked that these actions were not against the bank whose officers had indorsed the paper, but against prior parties; but the question in each case was as to the effect of what had been done towards transferring the paper. This, however, does not affect their application to this case; for if the indorsement operated to transfer the paper upon the principles of the law-merchant, it at the same time created by force of the same law the obligation of indorser. If the holder in these cases could write the name of the corporation over the signature of the officer, the contract would then be in the usual form, and would carry with it the ordinary consequences. The principle thus settled by the Supreme Court of Massachusetts carries into effect the intention of the parties to such transactions, is in accordance with legal analogies, by which effect is given to indorsements on negotiable paper by allowing them to be filled up in such manner as to carry out what was designed, and is not opposed to any case in our own courts. I am disposed to follow it in this case. In Moss v. Livingston, lately decided in this court and before referred to for another purpose, an officer of a corporation who had accepted a bill drawn on him as such, in his own name, adding the words, "President of the Rosendale Manufacturing Co.," was held to be individually liable. But it was not shown that he had authority to bind the company by an acceptance, and several of the judges placed their opinions upon the absence of such evidence. In a yet more recent case, we held that a corporate officer putting his name, with the addition of his office, as indorser upon a negotiable note held by the corporation, the indorsement being in its business, did not bind him personally. No question arose as to the liability of the corporation. Babcock v. Beman.

In the case before us, I am of opinion that the plaintiff was entitled to write over the signature of Mr. Stokes the words, "For the Patchin Bank." An indorsement in that form would render the defendant

[1] 18 Pick. 63.

liable as indorser. It is not necessary that a blank indorsement should be actually filled up on the trial, unless required by the defendant. In practice, it is rarely done: unless a point is made upon its omission, it is no cause for reversing the judgment.

When preparing the foregoing opinion, I was under the impression that the rulings at the circuit and the instructions to the jury substantially conformed with the views of the law which I have expressed. Upon an examination of the bill of exceptions, aided by my brethren, on consultation, I am convinced that one portion of the charge goes further than I had supposed, and beyond the positions above stated. The judge charged that if Stokes, the cashier, had special authority from the Patchin Bank, or from Patchin, the manager of the bank, to indorse the draft in question, the bank was bound by the indorsement, though it was for the railroad company an accommodation indorsement, and though the bill was made to raise money for the benefit of the railroad company. If the judge had added the qualification that the plaintiff had received and discounted the bill under a representation of the defendant that it was its bill which the cashier forwarded to be discounted for the defendant's benefit, I think the charge would have been quite correct. My brethren, however, do not now wish to express an opinion upon any other question than that the portion of the charge which I have just mentioned, as it stands unqualified, is erroneous.

The judgment must be reversed, and a new trial ordered on this ground.

HAND, J., delivered an opinion, in which he arrived at the conclusion that the judgment should be affirmed, except for the error in the charge, mentioned in the conclusion of the above opinion by Denio, J.

All the judges were in favor of reversing the judgment and ordering a new trial, on the ground that the charge to the jury was erroneous in the particular mentioned in the concluding part of the opinion of Denio, J. The court did not pass upon the other questions discussed in that opinion.[1] *Judgment reversed.*

[1] The opinion of Denio, J., has been generally adopted. Collins v. Johnson, 16 Ga. 458; State Bank v. Wheeler, 21 Ind. 90; Farmers' Bank v. Troy Bank, 1 Doug. (Mich.) 457; Andrews v. Astor Bank, 2 Duer, 629; Bank of Genesee v. Patchin Bank, 19 N. Y. 312; Bank of New York v. Bank of Ohio, 29 N. Y. 619; Robb v. Ross Co. Bank, 41 Barb. 586; Bissell v. First National Bank, 69 Pa. 415; Houghton v. First National Bank, 26 Wis. 668, *accord*.

See Fitch v. Lawton, 7 Miss. 871.

The principle upon which the decision in the principal case must rest is this, that the signature, "A B, Cashier," is, in effect, the name of the bank for which A B acts in its business transactions. So considered, the decision is no exception to the rule that a stranger to a bill or note cannot be sued thereon The same principle

THE CHILLICOTHE BRANCH OF THE STATE BANK OF OHIO v. WATSON A. FOX AND ELIJAH K. BRUCE.[1]

IN THE UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK, JANUARY, 1856.

[*Reported in* 3 *Blatchford*, 431.]

THIS was an action on a promissory note for $5,000, made by the defendants, payable "to the order of The Columbus Insurance Company, two years after date, on demand, with interest payable semi-annually." After a verdict for the plaintiffs, the defendants moved for a new trial, on a bill of exceptions. The facts in the case sufficiently appear in the opinion of the court.

HALL, J. 1. It is insisted by the defendants' counsel that there was no such indorsement and transfer of the note in suit, as to give to the plaintiffs, under the law-merchant, the right to maintain an action upon the note in their own name.

The bill of exceptions states that the plaintiffs, to maintain the issue on their part, proved (among other things) that the indorsement, "E. F. Drake, Presdt.," on the back of the note, was the genuine signature of the said E. F. Drake; that the said Drake, as such president, transferred the said note to the plaintiffs; that, at the time of the indorsement and delivery of the said note to the said plaintiffs, the said E. F. Drake was the president of the said The Columbus Insurance

applies to the signature of the managing officer of any business corporation to which is added the name of his office. On this ground, the corporation and not the officer was properly held liable in the following cases: —

(*a*) AS MAKER. — Hovey *v.* Magill, 2 Conn. 680; Means *v.* Swormstedt, 32 Ind. 87; Lacy *v.* Dubuque Co., 43 Iowa, 510; Yowell *v.* Dodd, 3 Bush, 581; Haile *v.* Peirce, 32 Md. 327; Mann *v.* Chandler, 9 Mass. 335; Smith *v.* Alexander, 31 Mo. 193; Despatch Line *v.* Bellamy Co., 12 N. H. 205; Randall *v.* Snyder, 1 Lans. 163.

But see, *contra*, McBean *v.* Morrison, 1 A. K. Marsh. 545; Fiske *v.* Eldridge, 12 Gray, 474; Haverhill Co. *v.* Newhall, 1 All. 130; Barker *v.* Mechanics' Co., 3 Wend. 94; Scott *v.* Baker, 3 W. Va. 285.

(*b*) AS ACCEPTOR. — Lazarus *v.* Shearer, 2 Ala. 718; Shelton *v.* Darling, 2 Conn. 435; Gillig *v.* Lake Co., 2 Nev. 214; Amison *v.* Ewing, 2 Cold. 366.

But see, *contra*, Moss *v.* Livingston, 4 Comst. 208, and conf. Haight *v.* Naylor, 5 Daly, 219.

(*c*) AS DRAWER. — Sayre *v.* Nichols, 7 Cal. 535; Witte *v.* Derby Co., 2 Conn. 260 Tripp *v.* Swanzey Co., 13 Pick. 291; Fuller *v.* Hooper, 3 Gray, 334; Carpenter *v.* Farnsworth, 106 Mass. 561; Kean *v.* Davis, 1 Zab. 683; Thompson *v.* Tioga R.R., 36 Barb. 79; Olcott *v.* Tioga R. R., 27 N. Y. 546. — ED.

[1] This case should strictly have been inserted in Chapter IV. Section III. — ED.

Company; and that such indorsement and transfer of the said note to the plaintiffs were made by the said Drake, as such president, by the authority and direction of the said Columbus Insurance Company. This, it is conceded by the defendants' counsel, shows a transfer and assignment of the note; but it is contended that the indorsement was not, in terms, in the name of the insurance company, and that therefore the plaintiffs are not indorsees, so as to entitle them to sustain a suit on the note in their own name.

I confess I can see no force in this objection. The usage is universal for the presidents and cashiers of incorporated companies, acting as the executive officers and agents of such companies, to make, in their behalf, indorsements and transfers of negotiable paper, by simply indorsing their names, with the additions of their titles of office. I cannot doubt that such an indorsement is sufficient to charge the corporation under whose authority the indorsement is made, and to transfer the note to the indorsee, so that the latter can maintain an action thereon in his own name.[1]

In this case, however, the transfer is fully admitted, and that, too, by an indorsement duly authorized. There certainly can be no reason for holding that the suit was improperly brought in the name of the indorsees.[2]

THE FIRST NATIONAL BANK OF ANGELICA, RESPONDENT, *v.* CHARLES F. HALL, IMPLEADED, &C., APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, JANUARY 10, MAY 1, 1871.

[*Reported in* 44 *New York Reports*, 395.]

APPEAL from an order of the general term of the Supreme Court in the Eighth District, affirming a judgment entered upon a verdict rendered for the plaintiff.

The action was upon the following draft: —

[1] McIntire *v.* Preston, 10 Ill. 48; Garrison *v.* Combs, 7 J. J. Marsh. 84; Baker *v.* Cotter, 45 Me. 236; Nichols *v.* Frothingham, 45 Me. 220; Northampton Bank *v.* Pepoon, 11 Mass. 288; Folger *v.* Chase, 18 Pick. 63; Nicholas *v.* Oliver, 36 N. H. 218; Knight *v.* Lang, 4 E. D. Sm. 381 (*semble*); Elwell *v.* Dodge, 33 Barb. 336; Clark *v.* Titcomb, 42 Barb. 122; Bissell *v.* First Bank, 69 Pa. 415; Maxwell *v.* Planters' Bank, 10 Humph. 507; Lyman *v.* Sherwood, 20 Vt. 42, *accord.*

Conf. Cocke *v.* Dickens, 4 Yerg. 29. (An indorsement by M. of a note payable to A. B., agent for M. No title passed. See Clark *v.* Reed, 20 Miss. 554, *contra.*) — ED.

[2] Only so much of the case is given as relates to the validity of the indorsement. — ED.

"$500. ORAMEL, June 22, 1865.

"Three months after date, pay to the order of J E. Robinson, cashier, five hundred dollars, value received, and charge same to the account of S. WATSON, Oramel.

"To C. F. HALL, Rochester, N. Y.

"Accepted, payable at the Commercial Bank of Rochester.

"C. F. HALL."[1]

J. C. Cochrane, for the appellant.

Samuel Hand, for the respondent.

EARL, C. There was no offer to show that the plaintiff knew any of the facts which the defendant offered to prove as constituting his defence, and hence the plaintiff must be treated as a *bona fide* holder for value, unless its title was defective, because the draft was payable to the order of Robinson, cashier, and was not indorsed by him. But, under the circumstances of this case, it is quite clear that the bank was the payee of the note, and not Robinson its cashier. It is alleged in the complaint, and admitted in the answer, that the draft was payable "to the order of the plaintiff's cashier, as such." In the case of The Bank of Genesee *v.* Patchin Bank,[2] S. B. Stokes, the cashier of the Patchin Bank, sent to the Bank of Genesee, to be discounted, a bill of exchange payable to the order of "S. B. Stokes, Cas.," endorsed by him with the same addition to his signature, and enclosed in a letter dated at the banking-house and signed "S. B. Stokes, Cas." It was held that these circumstances imported that the indorsement was that of the Patchin Bank in the regular course of business, and not that of S. B. Stokes individually. In Bank of New York *v.* Bank of Ohio,[3] it was held that a draft drawn payable to "D. C. Converse, Esq., cashier," who was the cashier of the defendant, was in judgment of law payable to the bank of which he was the officer. Hence, in this case, the position of the parties is the same as if this draft had been made payable to the plaintiff by name instead of its cashier, and no indorsement was necessary to give it the position of a *bona fide* holder, or to enable it to sue. The bank declined to discount the draft without another name. It was taken away, and came back with another name, and then the bank discounted it. I am unable to discover any defect in its title, or any defence in the evidence offered.

The judgment should be affirmed with costs.

All concur for affirmance. *Judgment affirmed with costs.*[4]

[1] The statement of facts has been abbreviated. — ED.

[2] 19 N. Y. 312. [3] 29 N. Y. 619.

[4] Baldwin *v.* Bank of Newbury, 1 Wall. 234; U. S. Bank *v.* Davis, 4 Cranch, C. C. 588; Davies *v.* Byrne, 10 Ga. 329; Vater *v.* Lewis, 36 Ind. 292 (*semble*); Pratt *v.* Topeka Bank, 12 Kas. 570; Comm. Bank *v.* French, 21 Pick. 486; Barney *v.* New-

comb, 9 Cush. 46; Barlow *v.* Cong. Soc'y, 8 All. 461 (*semble*); Garton *v.* Union Bank, 34 Mich. 279; Lacey *v.* Central Bank, 4 Neb. 179; Watervliet Bank *v.* White, 1 Den. 608; Wright *v.* Boyd, 3 Barb. 523; Manchester Bank *v.* Slason, 13 Vt. 334; Vermont R.R. *v.* Clayer, 21 Vt. 37 (*semble*), (conf. Rutland R.R. *v.* Cole, 24 Vt. 33), *accord.*

U. S. Bank *v.* Lyman, 20 Vt. 666 (U. S. C. Ct.), *contra.*

See also McHenry *v.* Ridgely, 3 Ill. 309; Fairfield *v.* Adams, 16 Pick. 381; Horah *v.* Long, 4 Dev. & B. 274; Rose *v.* Laffan, 2 Speers, 424; Frazier *v.* Moore, 11 Tex. 755; Johnson *v.* Catlin, 27 Vt. 87; Porter *v.* Nekervis, 4 Rand. 359, in which cases it was held that, upon a bill or note payable to "A B, Cashier," the action might properly be brought in the name of A B.

The signature of the managing officer of a business corporation coupled with the description of his office being in effect the name of the corporation for business purposes, the corporation was properly a plaintiff in Alston *v.* Heartman, 2 Ala. 699; Trustees *v.* Parks, 10 Me. 441; Dupont *v.* Mt. Pleasant Co., 9 Rich. 255.

But see, *contra*, Van Ness *v.* Forrest, 8 Cranch, 30; Chadsey *v.* McCreery, 27 Ill. 253; Buffum *v.* Chadwick, 8 Mass. 103.

Conf. Dugan *v.* U. S., 3 Wheat. 172; U. S. *v.* Barker, 1 Paine, 156; U. S. *v.* Boice, 2 McL. 352; Irish *v.* Webster, 5 Greenl. 171; State *v.* Boies, 11 Me. 474, in which a bill or note payable to an officer of government in his official capacity was held to be payable to the government. — Ed.

SECTION III.

A Bill or Note given for a Debt is Payment, either Conditional or Absolute.

VERNON v. BOVERIE.

IN THE KING'S BENCH, EASTER TERM, 1682.

[*Reported in* 2 *Shower*, 296.]

ACTION on the case for money received to the plaintiff's use, and for wares sold.

The case was this: the plaintiff having, by his factor, sold goods to the defendant, the factor comes to the defendant for his money, who tells him that he would give him a note on his banker (viz., the Temples who broke, which occasioned the dispute); and, accordingly, he writes a receipt in Mr. Boverie's book of receipts, who tells him his man should go with him, and he does go; and the bankers ask him if he would have money or notes. He says he must pay it away, and thereupon takes two notes, payable to the persons he was to pay it to, and receives of the banker seven shillings overplus; and, within three hours after, the banker breaks.

The question was, whether the merchant was still liable.

PEMBERTON, C. J., resolved on the trial of this cause at Nisi Prius, all this matter being disclosed on evidence, that he was not liable. It was agreed that, if the banker had refused to pay him, the merchant had been chargeable still, notwithstanding the receipt given in the merchant's book. But here the plaintiff had accepted the banker for his debtor, by receiving part of the money and taking notes in his friend's name; and so there was a negotiation of this matter, which discharged the merchant Boverie; and so the plaintiff became nonsuit

Shower, for the plaintiff[1]

[1] Crawley *v.* Crowther, Freem. C. C. 257; Strong *v.* Hart, 6 B. & C. 160; Smith *v.* Ferrand, 7 B. & C. 19; Anderson *v.* Hillies, 12 C. B. 499; Guardians *v.* Greene, 1 H. & N. 884; Southwick *v.* Sax, 9 Wend. 122; St. John *v.* Purdy, 1 Sandf. 9; Gibson *v.* Tobey, 46 N. Y. 637, *accord.* — ED.

CLARK v. MUNDAL.

At Guildhall, coram Holt, C. J., Trinity Term, 1694.

[*Reported in* 1 *Salk.* 124.]

A having a bill of exchange payable to him, and he being indebted to B in a sum of money, sends and indorses this bill to B. Afterwards, B brought assumpsit against A for the money, and on *non assumpsit* A gave in evidence this bill of exchange indorsed, and that it had lain so long in B's hands after it was payable, and reckoned it as money paid and in his hands; but it was disallowed, for a bill shall never go in discharge of a precedent debt, except it be part of the contract that it should be so. If A sells goods to B, and B is to give a bill in satisfaction, B is discharged, though the bill is never paid; for the bill is payment. But otherwise a bill should never discharge a precedent debt or contract; but, if part be received, it shall be only a discharge of the old debt for so much.[1]

WARD v. EVANS.

In the King's Bench, Easter Term, 1702.

[*Reported in* 2 *Lord Raymond*, 928.]

An action upon the case upon an *indebitatus assumpsit* was brought, wherein the plaintiff counts on three promises; viz. for £60 received by the defendant to the plaintiff's use, for £60 lent by the plaintiff to the defendant, and on an *insimul computasset* for £60. On *non assumpsit* pleaded, the cause was tried at the Nisi Prius at London, before the Lord Chief Justice Holt. And, on the evidence, the fact appeared to be: one Fellows, a merchant, who kept his cash with the defendant, Sir Stephen Evans, a goldsmith in Lombard Street, was indebted to the plaintiff in £60 10*s*. The plaintiff sent his servant to receive the money of Fellows, who ordered his servant to pay Ward's man the money at Sir Stephen Evans's. Accordingly, both the servants went to Sir Stephen Evans's shop, and there Fellows's servant directed the defendant's servant to pay Ward's servant the £60 10*s*., and to indorse it on a note of £100 from the defendant to Fellows, in part of payment of the £100. The defendant's servant accordingly indorses £60 10*s*. as paid on the said note of £100, and then paid 10*s*. to Ward's servant, and gave him a note subscribed by one Wallis, a goldsmith, for £60, payable to one Freeman, or bearer, which the plaintiff's servant accepted. This transaction was about

[1] Anon., Holt, 298; 12 Mod. 408, *accord.* — Ed.

noon, and at that time Wallis was a solvent person, and continued paying his bills till night. Next morning, the plaintiff's servant, coming with the note to receive the £60 of Wallis, found that Wallis had stopped payment, and was become insolvent. Whereupon, the plaintiff brings this action against the defendant for the £60. Note, it did not appear upon the evidence that the plaintiff was conusant of, or privy to, this transaction of his servant, or had given him any authority to receive a note instead of money, or approved of it afterwards. This matter, at the request of the defendant's counsel, was drawn up by way of case, and was put in the paper to be argued.

Three points were made in this case: First, whether this evidence was sufficient to maintain the declaration on any of the three counts. Secondly, whether the acceptance of the note upon Wallis by the plaintiff's servant without his direction or approbation shall bind the plaintiff. Thirdly, whether the delivery of such a note be in law a good and actual payment of the £60.

Mr. Sergeant *Hall* was of counsel for the defendant, and gave his opinion for his client, but did not think it necessary to labor the points.

Mr. Sergeant *Darnall*, for the plaintiff, argued that the servants of merchants might in some cases bind their masters by their acts; but then it must be in the business of a merchant; but a servant can't accept a bill of exchange drawn upon his master, to bind his master, unless there be plain and strong evidence that the master gave him authority so to do. And he cited Lex Mercatoria, 265, and a treatise concerning Bills of Exchange by John Marius, 47 (which Holt, C. J., said was a very good book). *A fortiori*, the servant in this case can't bind the plaintiff without his consent, where there is not the same necessity, nor the same advantage to the public by encouraging of trade. 2. This is no actual payment; for the law adjudges nothing actual payment but money, or other thing given or taken in satisfaction, by consent of both parties. Pynnel's Case.[1] This note is but a bare piece of paper, not valuable in itself, nor valuable to the plaintiff, for he can't bring any action to compel the payment of it, but in the name of Freeman, who may refuse to give him leave to use his name. He agreed that if A sells goods to B for £50, and at the same time B gives A such a note for £50, and A accepts it, this is an actual payment, although the note be never received; because it shall be taken as part of the contract that A was to accept such note in satisfaction for his goods. But where there is a preceding debt or duty, as in this case, such note will not amount to payment till it be paid, unless there be any negligence and delay in the party who takes the note in

[1] 5 Rep. 117.

going to receive it. For if the goldsmith continues solvent for a long time after the note delivered, and the party keep the note by him without demanding the money, and afterwards the goldsmith become insolvent, he that took the note shall stand to the loss of it, because by keeping the note he prevented the other from receiving it. But in this case the fact is otherwise; for the plaintiff's servant went the next morning to receive the money.

HOLT, C. J. When a servant is sent to receive money on a bill, he can't accept a note instead of money, without the particular directions of his master.[1] Suppose the servant, in this case, had brought Wallis's note home to the plaintiff, and the plaintiff had sent him back with it, refusing to accept it, and insisting to have money, then it would not have been a payment beyond all doubt. But, indeed, if the master does give his consent subsequent to the taking of the note, that will amount to an authority precedent. But then I am of opinion, and always was (notwithstanding the noise and cry that it is the use of Lombard Street, as if the contrary opinion would blow up Lombard Street), that the acceptance of such a note is not actual payment. I agree the difference taken by my brother Darnall, that taking a note for goods sold is a payment, because it was part of the original contract; but paper is no payment where there is a precedent debt. For, when such a note is given in payment, it is always intended to be taken under this condition, to be payment if the money be paid thereon in convenient time.[2] This note was demanded within convenient time;

[1] In Thorold v. Smith, 11 Mod. 87, Holt, C. J., thought that the authority of a servant to receive payment in goldsmith's notes "was more matter of evidence than law, and any jury at Guildhall would find payment by a bill to be a good payment, it being the common practice of the city." Accordingly, an agent authorized to receive payment of his principal's debt may take a check: Russell v. Hankey, 6 T. R. 12; Williams v. Evans, L. R. 1 Q. B. 352; Bridges v. Garrett, L. R. 5 C. P. 451 (see, however, Whitney v. Esson, 99 Mass. 308; Bradford v. Fox, 88 N. Y. 290; Levi v. Nat. Bank, 7 C. L. J. 249); but not a bill of exchange: Williams v. Evans, *supra*. — ED.

[2] Lord Holt's view has generally prevailed over the custom of merchants; and it is well settled that the acceptance by a creditor of negotiable paper made or indorsed by his debtor on account of the claim operates presumptively as a conditional payment or temporary merger of the claim. Accordingly, if the paper is not honored at maturity, action may be brought on the original claim.

Ex parte Barclay, 7 Ves. 597; Lumley v. Musgrave, 4 B. N. C. 9; Lyman v. Bank of U. S., 12 How. 225; Mooring v. Mobile Co., 27 Ala. 254; Higgins v. Wortell, 18 Cal. 330; Bill v. Porter, 9 Conn. 23; Morrison v. Smith, 81 Ill. 221; Edwards v. Trulock, 37 Iowa, 244; Shepard v. Allen, 16 Kas. 182; Proctor v. Mather, 3 B. Mon. 358; Gails v. Osceola, 14 La. An. 54; Berry v. Griffin, 10 Md. 27; Breitung v. Lindauer, 37 Mich. 217; Devlin v. Chamblin, 6 Minn. 468; Wadlington v. Covert, 51 Miss. 331; Christian v. Newberry, 61 Mo. 446; Foster v. Hill, 36 N. H. 526; Caldwell v. Fifield, 4 Zab. 150; Bradford v. Fox, 38 N. Y. 289; Syracuse R.R. v. Collins, 57 N. Y.

but if the party who takes the note keep it by him for several days, without demanding it, and the person who ought to pay it becomes insolvent, he that received it must bear the loss, because he prevented

641; First Nat Bank v. Morgan, 6 Hun, 846; Merrick v. Boury, 4 Oh. St. 60; McIntyre v. Kennedy, 29 Pa. 448; Sweet v. James, 2 R. I. 270; Chastain v. Johnson, 2 Bail. 574; Moses v. Trice, 21 Grat. 556; Aultman v. Jett, 42 Wis. 488.

The same rule applies when the debtor is not a party to the paper received by the creditor on account of his claim. Robinson v. Read, 9 B. & C. 449; Bottomley v. Nuttall, 5 C. B. N. S. 122; Peter v. Beverly, 10 Pet. 532; Fickling v. Brewer, 38 Ala. 685; Brown v. Olmsted, 50 Cal. 162; Clarke v. Savage, 20 Conn. 258; Huse v. McDaniel, 33 Iowa, 406; Graham v. Sykes, 15 La. An. 49; Glenn v. Smith, 2 Gill & J. 493; Guion v. Doherty, 43 Miss. 538; Powell v. Charless, 34 Mo. 485; Young v. Hibbs, 5 Neb. 433; Thompson v. Briggs, 28 N. H. 40; Ayres v. Van Lieu, 2 South. 765; Bates v. Rosekrans, 37 N. Y. 409; Spear v. Atkinson, 1 Ired. 262; Leach v. Church, 15 Oh. St. 169; Bowers v. Still, 49 Pa. 65; League v. Waring, 85 Pa. 244; Nightingale v. Chafee, 11 R. I. 609; Watson v. Owens, 1 Rich. 111.

In some jurisdictions, however, effect is so far given to the custom of merchants, that the acceptance of a promissory note or accepted bill of exchange on account of a claim is presumptively a satisfaction of the claim. Maxwell v. Day, 45 Ind. 509; Alford v. Baker, 53 Ind. 279; Wise v. Hilton, 4 Greenl. 435; Fowler v. Bush, 21 Pick. 230; Green v. Fox, 7 All. 85; Ely v. James, 123 Mass. 44; Collamer v. Langdon, 29 Vt. 82. But this presumption may be rebutted by evidence that the security was accepted as a conditional payment only. Paine v. Dwinel, 53 Me. 52; Melledge v. Boston Co., 5 Cush. 158; Parham Co. v. Brock, 118 Mass. 194. On the other hand, a check or unaccepted bill taken on account of a claim is held, at least in Maine and Massachusetts, to be within the general rule of conditional payment. Zerrano v. Wilson, 8 Cush. 424; Derickson v. Whitney, 6 Gray, 248; Weddigen v. Boston Co., 100 Mass. 422; Marrett v. Brackett, 60 Me. 524; Strang v. Hirst, 61 Me. 9.

The acceptance of a negotiable security in conditional payment of a claim secured by a lien in the nature of a charge, *e. g.* a maritime lien, a mechanic's lien, or a vendor's lien for the purchase price of real estate, and the like, is not a waiver of the lien. Grant v. Mills, 2 V. & B. 306; The Emily Souder, 17 Wall. 666; The Napoleon, 7 Biss. 393; Farwell v. Grier, 38 Iowa, 83; Christian v. Newbury, 61 Mo. 446. It has been held also that, upon the dishonor of a negotiable security accepted as conditional payment of a claim, a lien dependent upon possession revives, if the creditor still retains the property in his possession, or can stop it *in transitu*. New v. Swain, Dan. & L. 193; Dixon v. Yates, 5 B. & Ad. 313; Miles v. Gorton, 2 Cr. & M. 504; Valpy v. Oakeley, 16 Q. B. 941; Griffiths v. Perry, 1 E. & E. 680; The Kimball, 3 Wall. 37; Newhall v. Vargas, 13 Me. 93; Donath v. Broomhead, 7 Barr, 301; Hays v. Mouille, 14 Pa. 48. But see Tamvaco v. Simpson, 19 C. B. N. S. 478, *per* Byles, J.

The paper of a third person taken by a vendor at the time of the sale, without the indorsement or guaranty of vendee, has been held to be presumptively at the risk of the vendor. Whitbeck v. Vanness, 11 Johns. 409; Breed v. Cook, 15 Johns. 241; Noel v. Murray, 13 N. Y. 167; Des Arts v. Leggett, 16 N. Y. 582; Gibson v. Tobey, 46 N. Y. 637; Ferdon v. Jones, 2 E. D. Sm. 106; Bicknall v. Waterman, 5 R. I. 43; Eaton v. Cook, 32 Vt. 58. But this presumption may be rebutted. Youngs v. Stahelin, 34 N. Y. 258; Torry v. Hadley, 27 Barb. 192. Conf. Owenson v. Morse, 7 T. R. 64; Roget v. Merritt, 2 Cai. 117; Benedict v. Field, 16 N. Y. 595. If the paper is indorsed or guaranteed by vendee, it is, presumptively, only conditional payment. Monroe v. Hoff, 5 Den. 360; Whitney v. Goin, 20 N. H. 354; Butler v. Haight,

the other person from receiving the money by detaining the note in his custody. As for the nature of the action, I am of opinion that an *indebitatus assumpsit* for moneys received to the plaintiff's use lies properly in this case, and that this evidence is sufficient to maintain the plaintiff's declaration. For when the £60 was indorsed on Fellows's bill, as so much actually paid by Sir Stephen Evans to Fellows, Fellows directing that sum to be paid to the plaintiff, and the defendant having the money in his hands, it amounts to a receipt of so much by the defendant to the plaintiff's use. No doubt the action were maintainable, if the plaintiff had brought the note back again to the defendant; and, though he did not, since it does not amount to actual payment, the plaintiff must recover.

POWELL, J. This evidence will maintain the declaration; for Fellows's cash remaining in the defendant's hands, when by the indorsement the defendant is discharged from so much of Fellows's note as against him, that money being to be paid by his direction to the plaintiff, it is a receipt by the defendant to the plaintiff's use. The delivery and acceptance of Wallis's note is no payment; for, when a master sends his servant to receive money, he cannot accept a note in lieu of it. Perhaps if the master had been there himself, he would have refused the note, as knowing the insufficiency of Wallis; and shall the servant oblige him to take such a note by his acceptance, without his master's directions? Indeed, if the master consents to it afterwards, that amounts to a previous command. Then the taking of such a note is no payment; for it is always a conditional acceptance, and so understood, not to be a discharge till paid; and, if it should be otherwise, it would be to let in fraud, and give goldsmiths and others an opportunity of cheating traders. But still the money ought to be demanded in convenient time; for, if the party keep the note by him without demanding it, he must run the hazard of it; but here it was demanded in due time.

Let the plaintiff take his judgment, *per totam curiam*.

8 Wend. 585. This presumption may also be rebutted. Soffe *v.* Gallagher, 8 E. D. Sm. 507.

Although a negotiable security accepted as conditional payment of a debt has been honored, it has been held that the debt is to be considered as paid, not from the time of the delivery of the security, but from the time when it is honored. Sayer *v.* Wagstaff, 5 Beav. 415; *In re* Harries, 13 M. & W. 8; *In re* Wilton, 18 L. J. Q. B. 17. But, when a negotiable security is given in conditional payment of a claim barred by the Statute of Limitations, the new cause of action dates from the time of the delivery of the security. Gowan *v.* Forster, 3 B. & Ad. 507; Irving *v.* Veitch, 3 M. & W. 90; Turney *v.* Dodwell, 3 E. & B. 136; Harper *v.* Fairley, 58 N. Y. 442; Smith *v.* Ryan, 66 N. Y. 352. Conf. Haven *v.* Hathaway, 20 Me. 345; Whipple *v.* Blackington, 97 Mass. 476. So also the delivery of a bill or note would doubtless be a part-payment within the section of the Statute of Frauds relating to the sale of goods, wares, and merchandise. Benj. Sales, 2d ed. 141. — ED.

STEDMAN v. GOOCH.

AT NISI PRIUS, CORAM LORD KENYON, C. J., MAY 14, 1793.

[*Reported in* 1 *Espinasse*, 8.]

THIS was an action of assumpsit for goods sold and delivered. The defendant pleaded the general issue.

The defence relied upon by the defendant was that the plaintiff, in discharge of her bill, which was for millinery goods furnished to the defendant, had taken three promissory notes of one Finlay, payable at the house of a Mr. Browne, and had given the defendant a receipt to that effect.[1]

LORD KENYON was of opinion that it then became incumbent on the plaintiff to prove: first, that she had used due diligence to get the money from Finlay; and, secondly, that he, after notice, had made default in the payment.

To show that she had used due diligence to get the money from Finlay, the plaintiff proved that she had sent Finlay's notes to Browne, where they were made payable, and that he had been applied to respecting the payment; that, in answer to that application, he had said that he knew Finlay, but that he had no effects of his in his hands, nor could he pay them unless he had.

It was then objected by the counsel for the defendant that it appeared that these notes had been returned before they were payable; and that the plaintiff, having taken them in discharge of her debt, for goods sold, could not maintain an action on her original debt for the goods, until an actual default in the payment of these notes given in discharge of it, as the notes might be paid when they became due; nor should the plaintiff be allowed to judge of the probable or improbable ability of the party to pay at a future day.

LORD KENYON overruled the objection. He said that to this effect the law was clear, that, if in payment of a debt the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt, until such bill or note becomes payable, or default is made in the payment; but that if such bill or note is of no value, as if, for example, drawn on a person who has no effects of the drawer's in his hands, and who therefore refuses it, in such case he may consider it as waste paper, and resort to his original demand, and sue the debtor on it.

[1] Only so much of the case is given as relates to this defence. — ED.

KEARSLAKE AND ANOTHER v. MORGAN.

IN THE KING'S BENCH, FEBRUARY 7, 1794.

[*Reported in* 5 *Term Reports*, 513.]

ASSUMPSIT for goods sold and delivered, money lent, &c. Pleas: 1st, the general issue; 3d, that, as to the said sum of £4 14*s.* 3*d.*, the said W. Pierce, before the commencement of this suit at, &c., made his certain note in writing, according to the form of the statute, &c., and then and there delivered the same to the defendant; by which said note the said W. Pierce promised to pay to the defendant or his order, at a certain time in the said note mentioned, and elapsed before the commencement of this suit, the sum of £10; that the defendant afterwards and before the time appointed by the said note for the payment of the said sum of money therein mentioned, to wit, on, &c., at, &c., for and on account of the said sum of £4 14*s.* 6*d.* and of a certain other sum of £5 5*s.* 6*d.*, paid by the plaintiffs to the defendant, made his certain indorsement in writing upon the said note, and then and there delivered the said note, with the said indorsement thereon, to the plaintiffs; by which said indorsement and delivery the defendant appointed the contents of the said note to be paid to the plaintiffs; and that the plaintiffs then and there accepted and received the note for and on account of the said several sums of £4 14*s.* 6*d.* and £5 5*s.* 6*d.*, to wit, at, &c., with a verification, &c. The plaintiffs demurred generally to the third plea.

Alderson, in support of the demurrer. The general rule is that the acceptance of a security of equal degree is no extinguishment of a former debt; and, unless it be, it cannot be pleaded in bar of it. May *v.* King[1] and Roades *v.* Barnes.[2] A promise, before it is broken, may be discharged by parol agreement; but it cannot afterwards, without accord and satisfaction pleaded or a release. In the last-mentioned case, the court expressly said that a promissory note could not be pleaded in bar to an action upon simple contract. If this be the general rule, the defendant must show that his case comes within some exception: as that the note was received in full satisfaction; or that it has been indorsed over by the plaintiffs, or paid; or that the plaintiffs have been guilty of laches in not presenting it for payment, whereby they have made it their own. But the defendant has not, by this plea, brought his case within either of those exceptions. So far from there being any averment that the note was received in satisfac-

[1] 1 Lord Raym. 680. [2] 1 Burr. 9.

tion for the debt, which is essentially necessary, the contrary is rather to be inferred; for, in another plea, the defendant states in express terms that it was received in satisfaction. And, if he meant in this plea to aver the same thing, it is not pleaded with sufficient certainty. Cumber *v.* Waine.[1] And though that case has been overruled in one particular,[2] — namely, that it need not appear to the court to be a reasonable satisfaction, — yet the case, in other respects, stands good. A plea of satisfaction must at least aver it to be such on the face of it; but here it is only stated that the note was received for and on account of the debt, which words are too loose and indefinite; and *non constat* but it might have been taken as a collateral security, which is not an extinguishment of a preceding debt. Neither has the defendant brought his case within either of the other exceptions; for it is not stated that the note has been indorsed over or paid, or that the plaintiffs have been guilty of laches. It may be urged that, as these things were best known to the plaintiffs, they ought to have replied the fact: but it is a general rule in pleading that every matter ought to be alleged by the party who supports the affirmative; and the plaintiff, in such a case, must have alleged in his replication a long string of negatives. Besides, the defendant ought not to have greater advantage by pleading specially than by relying on the general issue; and, if he had done the latter, it would not have been sufficient for him to have shown that he had given a promissory note for the debt, unless he had also shown payment, or laches on the part of the plaintiffs, by reason of which they had not received payment.

Bailey, contra, admitted that the acceptance of the note by the plaintiffs was not, at all events, an extinguishment of the debt, but contended that the acceptance of a negotiable instrument for and on account of a debt must be taken *prima facie* to be in satisfaction of that debt, unless it appeared that the note still remained unpaid in the possession of the plaintiffs without any laches by them. For, if the note be paid, or if it be indorsed over, so that it is not forthcoming again to the defendant, and he may be sued upon it by any third person, that will amount to an extinguishment of the debt. The defendant has once actually advanced the money upon the note to the maker; and, unless he has the means of reimbursing himself again, he ought not to pay the equivalent to the plaintiffs, by whose default he is deprived of the means of such reimbursement. If the note were paid, there could be no doubt. But suppose it were now in the hands of an indorsee, who had given to the plaintiffs a valuable consideration for it: it would be very unjust that he should recover the amount again, or that the defendant should be bound to pay twice for it; and yet the

[1] 1 Stra. 426. [2] *Vide* Heathcote *v.* Crookshanks, 2 T. R. 26, 28.

defendant would have no defence against such indorsee. Again, suppose the plaintiffs had been guilty of laches in not presenting the note for payment in time, it would be very unjust that the defendant should suffer on that account. Now all these are facts lying peculiarly within the knowledge of the plaintiffs themselves, and not of the defendant; and therefore they ought to be shown by the former. The defendant cannot know whether the plaintiffs have indorsed the note away, or whether they presented it in time for payment, or whether they have received the money, or whether they have lost the note. The allegations that the note was not presented in time, or that due notice was not given, are merely negative allegations, which is never necessary unless the facts lie peculiarly in the knowledge of the party who is to allege them, and they are alleged by way of breach. In Rex v. Baxter,[1] upon an indictment on the 22 Geo. III. c. 58, f. 1, which makes the receiver of stolen goods punishable, though the principal has not been convicted, except where the person committing felony has been already convicted of grand larceny or some greater offence, an objection was taken, that it was not alleged that the principal had not been convicted of grand larceny or any other greater offence; but it was overruled. And Buller, J., in delivering the opinion of the court, said that the averment was not necessary: if it were, it would merely be stating a negative averment, which need not be proved by the prosecutor. Such a fact is matter of evidence to be proved by the defendant, and which, when proved by him, would entitle him to an acquittal. So, 2 Hawk. c. 25, f. 112, says it is a good general rule that every indictment must bring a defendant within all descriptions mentioned in the body of the act, except they are such as carry with them the bare denial of a matter, affirmation whereof is a proper and natural plea for the defendant; as where it is enacted that all persons having no reasonable excuse to be absent shall go to their parish church, in which case it is said that it is not necessary to show that the defendant had no reasonable excuse, for that will come most properly from the plea of the defendant. But this plea may also be supported upon the 3 & 4 Anne, c. 9, which, having put promissory notes upon the same foot as inland bills of exchange, enacts[2] "that, if any person doth accept any such bill of exchange for and in satisfaction of any former debt or sum of money formerly due unto him, the same shall be accounted and esteemed a full and complete payment of such debt, if such person, accepting of any such bill for his debt, doth not take his due course to obtain payment thereof, by endeavoring to get the same accepted and paid, and make his protest as aforesaid, either for non-acceptance or non-payment thereof."

[1] 2 T. R. 88.

[2] Sect. 7.

He then cited the case of Richardson *v.* Rickman,[1] which was an action for goods sold and delivered, and on the common counts; to which the defendant pleaded: "1st, *non assumpsit;* 2dly, that after the making of the promises, &c., to wit, on, &c., at, &c., an account was had and stated between the plaintiff and defendant, &c., on which the defendant was found in arrear to the plaintiff in £22 1*s.*, for which the plaintiff afterwards, to wit, &c., on, &c., at, &c., according to the usage and custom of merchants, made his certain bill of exchange in writing, bearing date the same day and year last aforesaid, and then and there directed the same to the defendant, and thereby requested him, at thirty days after the date thereof, to pay to Messrs. H. or order the said £22 1*s.*, and then and there delivered the said bill of exchange to the said Messrs. H.; which said bill of exchange he, the said defendant, afterwards, &c., duly accepted, according to the usage of merchants aforesaid; and by reason thereof, and according to the usage and custom of merchants, the defendant became, and was, and still is, liable to pay the said £22 1*s.* to the said Messrs. H. or their order, according to the tenor and effect of the said bill, and his said acceptance thereof, and this, &c., wherefore," &c. To this second plea there was a general demurrer, in support of which Morgan argued that the plea went in discharge, and therefore amounted only to the general issue. He objected that it did not state that the defendant had paid or tendered the money; that a chose in action was no bar, Taylor *v.* Baker;[2] and that a debt actually due could not be discharged without a release, 3 Lev. 237. Wood, *contra*, was stopped by Lord Mansfield, who said "that a bill of exchange, unless there were an agreement that it should be so, was no satisfaction; but that this was a bill accepted by the party and negotiable, and that was payment (10 Mod. 37), and judgment was given for the defendant. Now *non constat*, but in this case the bill has been negotiated, and whether it is or not must best be known by the plaintiff."

Alderson, in reply, observed that in the case last cited of Richardson *v.* Rickman it did appear upon the face of the plea that the bill was in the hands of a third person other than the plaintiff to whom the debt was originally owing.

The court, being of opinion that the plea was good, recommended it to the plaintiffs to withdraw their demurrer, and reply to it, to which Alderson agreed; whereupon

Leave was given to the plaintiffs to amend.[3]

[1] B. R. M. 16 Geo. III. [2] 5 Mod. 186.

[3] Kendrick *v.* Lomax, 2 Cr. & J. 405; Crisp *v.* Griffiths, 2 C. M. & R. 159 (*semble*); Simon *v.* Lloyd, 2 C. M. & R. 187; Mercer *v.* Cheese, 4 M. & G. 804; Maillard *v.* Duke of Argyle, 6 M. & G. 40; Kemp *v.* Watt, 15 M. & W. 672; Price *v.* Price, 16 M.

& W. 232; McDowall v. Boyd, 17 L. J. Q. B. 295; Nat. Sav. Bank v. Tranah, L. R. 2 C. P. 556; Black v. Zacharie, 3 How. 483; Smith v. Applegate, 1 Daly, 90, *accord* Roades v. Barnes, 1 Burr. 9, *contra*.

But the rule of conditional payment does not apply to orders for goods. Griffiths v. Owen, 13 M. & W. 58. Nor to non-negotiable bills or notes. James v. Williams, 18 M. & W 828; Chamberlyn v. De la Rive, 2 Wils. 353; Gahn v. Niemcewicz, 11 Wend. 312. In James v. Williams, *supra*, Alderson, B., said, p. 833: "The rule which is laid down in Kearslake v. Morgan, and which has been confirmed in modern cases in this court, is that, when bills of exchange are stated to have been delivered for and on account of a promissory note or any other sum in the declaration mentioned, then it is to be taken as a conditional payment; but this rule is confined to negotiable instruments alone."

The mode of pleading the defence of conditional payment was determined by the case of Price v. Price, *supra*, which is given here without the arguments of counsel:

January 12, 1847. [Debt by the plaintiff as payee, against the defendant as maker, of a promissory note for £100, made on the 21st of November, 1840, and payable at six months' date. There were also counts for money lent, interest, and on an account stated.

Plea: as to £100, parcel of the moneys in the second, third, and last counts mentioned; that, after the said sum of £100 had become due, and before the commencement of the suit, to wit, on, &c., the defendant made his promissory note in writing, for the payment to the order of the plaintiff of £100 at six months after date, and delivered the same note to the plaintiff, who then took and received the same for and on account of the said sum of £100, parcel, &c., and the causes of action in respect thereof. Verification.

Replication, that the said period of six months, specified in the said promissory note in the plea mentioned, expired before the commencement of this suit, and the said note became then and thereupon, and before the commencement of this suit, to wit, on, &c., payable according to the tenor and effect thereof, yet the defendant hath not paid the same or any part thereof.

Special demurrer.

PARKE, B. This case was argued a few days ago, before my brothers Alderson, Rolfe, Platt, and myself, by Mr. Peacock and Mr. Wells. The principal point argued by Mr. Peacock was that the plea was a good *prima facie* answer to the declaration, and that the replication ought to have alleged negatively that the plaintiff had not indorsed over the note, and further that he was ready to deliver it up on payment. That the first averment ought to have been made by the plaintiff, because it lay peculiarly in his knowledge whether he had indorsed the note or not, which the defendant could not know; and also that it ought to have averred that the plaintiff had offered to return the note, or was ready to deliver it up on payment, because that was required by the law-merchant, as settled by the case of Hansard v. Robinson. It was answered that the plea was not *prima facie* a sufficient answer, on two grounds: first, that it was not properly averred that the note was both given and received on account of the debt; and, secondly, that the plea was defective, in not stating either that the note was running at the time of the commencement of the suit, or, if not, that it was transferred to a third person. Mr. Peacock relied principally on the case of Mercer v. Cheese, in the Common Pleas, where the court intimated an opinion that a similar plea was good on a demurrer to it, and that the plaintiff ought to have stated in his replication that the bill still remained in his hands. If that case had been heard to its close, and decided in the way in which some of the judges expressed an opinion, it would have concluded the present case, and we should have acted upon it. But as the counsel for the plaintiff, upon that inti-

mation, immediately asked leave to amend, which was granted, the case cannot be considered as a binding authority; nor, on the other hand, can the *dictum* cited in Crisp v. Griffiths, as to the necessity of further averment in the plea, when the time the bill or note has to run has expired before the commencement of the suit, be entitled to much weight for the plaintiff, as that case also ended in a recommendation to amend, and an amendment accordingly. The case therefore comes before us without any authority binding upon us, precisely in point, and we must determine it in analogy to the principles of previous decisions.

One of the earliest authorities is the *dictum* of Lord Kenyon, in Stedman v. Gooch. He said that "to this effect the law was clear, that if, in payment of a debt, the creditor is content to take a bill or note payable at a future day, he cannot legally commence an action on his original debt, until such bill or note becomes payable, or (I suppose *and*) default is made in the payment." The case of Kearslake v. Morgan (though that case also ended in a recommendation to amend), and that of Richardson v. Rickman, there cited, are two other early authorities on this branch of law, and these cases have, we believe, been constantly acted upon. The delivery and receipt of a negotiable instrument, on account of a debt, is payment by the 3 & 4 Anne, c. 9, § 7, if the person accepting it does not take his due course, and so obtain payment thereof by endeavoring to get the same accepted and paid. If that instrument is made payable to a third person, as in the case of Richardson v. Rickman, or is made by a third person, as in the case of Kearslake v. Morgan, the plea, stating the delivery and acceptance of the negotiable instrument, is a sufficient answer in the first instance. If the plaintiff had taken up the bill in the former case, or presented the note at maturity in the latter to the maker, and given due notice of dishonor to the defendant, these facts would have formed the proper subject of a replication.[1] But if the plea state no more than that a negotiable note is given for and on account of the debt, by which the defendant promised to pay the plaintiff, or order, a sum of money, and does not state the note to be still running (which is the case), there seems to us to be no *prima facie* answer. The remedy is not suspended at the time of action brought, so that there is no defence on that ground; and, according to the principles of pleading, it is to be intended that the note remains as it was, and that no order was made by the plaintiff for the payment to a third person, as it is not so averred; and, therefore, for any thing stated in the plea, the note remains overdue in the hands of the plaintiff: so that the suspension of his right of action for the original debt is at an end, and he may recover the amount, no presentment or notice of dishonor being necessary in his case; and therefore such a plea is no answer to the action. In a declaration on a note payable to order, it never is stated that no order was made, but it is presumed that there is none until the defendant pleads it, though it is true in both cases that the fact, whether an indorsement has been made or not, lies more in the plaintiff's knowledge than the defendant's. But, in the case of a declaration, the rule that a party is to plead facts within his own knowledge gives way to the rule that things are to be presumed to continue in the same state till the contrary appears. To make this plea, therefore, good, it should be averred that the note was not in the plaintiff's hands; that is, that it was indorsed over before action brought.

It is, however, no such hardship as it has been represented for the defendant to

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[1] See, to the same effect, Jennison v. Parker, 7 Mich. 355; Phœnix Co. v. Allen, 11 Mich. 501; 18 Mich. 191; Dayton v. Trull, 23 Wend. 345; Gordon v. Price, 10 Ired. 385.

But see, *contra*, Kenniston v. Avery, 16 N. H. 117; Bradford v. Fox, 38 N. Y. 289; Syracuse R R v. Collins, 57 N. Y. 641; Kelsey v. Rosborough, 2 Rich. 241. — Ed.

be called upon to aver an indorsement, and so make out a good plea; for he must find out the indorsee, if there is one, at his peril, when the bill is due, and pay him, as the law does not require notice of indorsement. Reynolds v. Davies, 1 B. & P. 625. And as such averment would not be required in a plea, unless the bill was overdue and unpaid, practically the defendant would always know both of the fact of the indorsement and the name of the indorsee. There is, therefore, no such inconvenience in obliging the defendant to rebut the inference that the note remained in the plaintiff's hands, by showing the contrary, and so making the plea a good answer to the action. In order to make it such, it must show either a suspension of remedy, by averring that the security is not due, or a transfer of liability, by showing an indorsement to a third person.

But it is said that, if the plaintiff declare on the note (when it is admitted he need not aver that it is in his hands), he must, if the plea deny the note, produce it, and so give evidence that, at the time of its production at least, it is his, which affords some security to the defendant against being called on to pay a third person; whereas, if there was an issue on this plea, the plaintiff would not be bound to produce the note, and he might oblige the defendant to pay the original debt, and also the note, if indorsed to the indorsee. But then it is also true that the defendant would be liable to the same inconvenience, though not in the same degree, if the plaintiff had replied as it is said he ought to have done, and averred his readiness to deliver before suit, for he might have indorsed the bill after the commencement of the suit, or even after the replication itself; so that the course of pleading proposed by the defendant would mitigate, not remove, the evil. But no evil will arise if the defendant plead, what he must always practically know, that the note has been indorsed over.

For these reasons, we think the plea is bad; and we need not decide whether it is bad on the grounds on which the court intimated that a plea somewhat similar was bad in the case of Crisp v. Griffiths, — probably we should hold it good.

Nor need any thing be said as to the absence of the averment of readiness to deliver, — an averment which is never introduced into any declaration or replication, though the case of Hansard v. Robinson shows that, in the case of negotiable securities, the party liable is not bound to pay without the production of the security. The case itself was that of a negotiable instrument payable to bearer, by reason of an indorsement in blank; but, on referring to the judgment, it appears that it was meant to apply to all cases of negotiable instruments. It does not, however, apply to non-negotiable bills or notes, as was decided by the Court of Queen's Bench in Wain v. Bailey, 10 Ad. & E. 616. *Judgment for the plaintiff.*[1]

[1] Conf. Hughes v. Wheeler, 8 Cow. 77. — Ed.

Ex parte BLACKBURNE.

IN CHANCERY, BEFORE LORD ELDON, C., DECEMBER, 1804.

[*Reported in* 10 *Vesey*, 204.]

GEORGE and Henry Brown, of Liverpool, being indebted to the petitioner to the amount of £3,000, for goods sold and delivered, under an agreement for payment by bills at three months after date, gave him a check upon their bankers, Caldwell & Co., of Liverpool, who drew upon their correspondents in London, Burton, Forbes, and Gregory, a bill for the amount of three months after date, to the order of the petitioner. The bill was accepted; but, before it became due, commissions of bankruptcy issued against the acceptors, the drawers, and the Browns. The petitioner proved his debt, and received dividends under the commissions against the acceptors and the drawers. Afterwards he offered to prove a debt of £3,000, for goods sold and delivered under the commission against the Browns, exhibiting the bill as a security for that debt; but, the bill not being indorsed by the Browns, the commissioners refused to admit his proof, unless he would account for the dividends received by him from the estates of the drawers and acceptors, and assign the future dividends in respect of the bill. The petition, therefore, was presented, praying that the petitioner may be at liberty to prove his said debt of £3,000 against the estate of the Browns, without delivering up the bill, or making over the dividends; and that he may receive a dividend upon such sum as shall not be satisfied out of the estates of the acceptors and drawers.

Mr. Romilly, in support of the petition, cited *Ex parte* Dixon before Lord Thurlow, *Ex parte* Thomas and *Ex parte* Myers, before Lord Rosslyn, in these bankruptcies.

Mr. Richards and *Mr. Cooke*, for the assignees. The last decision upon this point, *Ex parte* Rathbone, before Lord Rosslyn, in these bankruptcies, is in favor of the assignees. First, the petitioner is bound to have this bill considered as payment, and cannot consider it as a security. Clark *v.* Mundal; The Bank of England *v.* Newman; *Ex parte* Taylor, Aug. 7, 1795, in which it was held that, if a bill is taken for goods, and is not indorsed, it is payment. That decision certainly was doubted by your lordship and the solicitor-general. But the principle is that he takes the bill, meaning to abide by it, and cannot resort back to the other remedy. This is the precise case put by Lord Holt in Clark *v.* Mundal. There was no contract for security.

But, secondly, if the petitioner is not bound to take the bill as payment, he must rescind the transaction altogether, and deliver up the bill, according to the opinion of Lord Kenyon, in Puckford *v.* Max-

well,[1] that, if a bill turns out bad, the holder may, if he thinks fit, consider it as a nullity. But he cannot, as attempted here, consider it as a security. Not taking it as payment, he is bound to return it.

Mr. Romilly, in reply. Lord Kenyon means a bill certain, not in the abstract. This agreement is for payment by bills at three months, which must be understood good bills.

THE LORD CHANCELLOR ELDON. I take it to be now clearly settled that, if there is an antecedent debt, and a bill is taken, without taking an indorsement, which bill turns out to be bad, the demand for the antecedent debt may be resorted to.[2] It has been held that, if there is no antecedent, and A carries a bill to B to be discounted, and B does not take A's name upon the bill, if it is dishonored, there is no demand, for there was no relation between the parties, except that transaction; and the circumstance of not taking the name upon the bill is evidence of a purchase of the bill.[3] In a sale of goods, the law implies a contract that those goods shall be paid for. It is competent to the party to agree that the payment shall be by a particular bill. In this instance, it would be extremely difficult to persuade a jury, under the direction of a judge, to say an agreement to pay by bills was satisfied by giving bills, whether good or bad. The bills were only a mode of paying the debt of £3,000. If they are not paid, the original debt arising out of the contract for goods sold and delivered, remains. It is clear the creditor, still holding the bills, cannot resort to that original contract. In general cases, where the bill is not paid, if there is no bankruptcy, the creditor must come immediately upon the bill dishonored, saying he cannot procure payment, and desiring to have payment; and then he might maintain an action for goods sold and delivered. There may be cases in which he may have received part of the money, without involving the difficulty from giving time as to the rest of it, as if part was paid before it was due: in that case, if no time was given for payment of the residue, an action for goods sold and delivered would lie for the residue.

As to the cases in bankruptcy, there are considerable difficulties attending all the transactions in such a case as this. There must be some mistake in Lord Rosslyn's order, *Ex parte* Myers; for, to the extent in which his debt was paid, he could not possibly prove, but only for the remainder. On the other hand, if you are to go under the commission against the man who bought the goods, and draw out 20*s.* in the pound, and if by so doing you bring the others upon the bank-

[1] 6 Term Rep. 52.

[2] 1 Cooke's Bank. Law, 124, 174, 5th ed.; 8th ed. by Mr. Roots, 147; *Ex parte* Rathbone, Buck. 215; 3 Madd. 134; *Ex parte* Hodgkinson, 19 Vesey, 291.

[3] See *Ex parte* Shuttleworth, 3 Vesey, 368, note (*a*).

rupt, it is hard; but, though hard, it may not be unjust. Lord Thurlow thought it also unjust. The order in *Ex parte* Dixon was upon this principle, that, if the holder made as much of the bill as he could, it was not competent to the vendee to say there should not be proof under his bankruptcy for the residue of the money. His lordship allowed a claim upon the whole, not for the purpose of receiving a dividend upon the whole, but to receive such sum as should be unpaid under the other commission, allowing it to be considered as a nullity, so far as it was a nullity, and proof for the residue. The ground upon which the petition in *Ex parte* Rathbone was dismissed must have been that the bill was received in discharge and satisfaction of the price, in this sense, that it was to be the payment, and the only mode of payment.

My opinion is that in this transaction it was not an essential part of the contract that he who received the bills should never have a demand for goods sold and delivered, if the bills were not paid. If this case does not fall within *Ex parte* Rathbone, I understand Lord Thurlow's order to be one that ultimately did not permit proof beyond what remained unpaid, though in the form the claim was for the whole. Lord Thurlow's order, so understood, appears to me the best.

Therefore, let a claim be made, and the dividends reserved for the whole, not to be paid until it is seen what shall be paid under the other commissions; then let the proof be for the difference between what is so paid and 20*s.* in the pound, the dividends to be paid upon that residue.[1]

BRIDGES v. BERRY.

In the Common Pleas, July 9, 1810.

[*Reported in* 3 *Taunton*, 130.]

This action was brought upon two bills of exchange: one for £117 11*s.* 2*d.* drawn on the 26th of October, 1809, by the defendant, at two months' date, upon one Ivory, payable to his own order; the other for £119, drawn on the 17th July, 1809, at three months' date, by one Box, upon the defendant, and accepted by him. At the trial of this cause, at the Middlesex sittings in the present term before Mansfield, C. J., it appeared that, a few days after the bill accepted by the defendant had become due, the plaintiff applied to him for payment, and that the defendant, confessing his inability then to pay, requested further time, and indorsed to the plaintiff, and lodged in his hands, the bill for £117

[1] See Bottomley v. Nuttall, 5 C. B. N. S. 122. — Ed.

11*s.* 2*d.* as a security, and paid him in cash the difference, with the interest and costs of the former bill. When this bill for £117 11*s.* 2*d.* became due, it was not paid by the acceptor; but no notice of the non-payment was given to the defendant, the drawer of that bill. It was admitted on the part of the plaintiff that the defendant was discharged from the latter bill; but it was insisted that he continued liable on the first bill for £119. On the part of the defendant, it was contended that he was also discharged from his liability to pay that bill; and the judge, being of that opinion, nonsuited the plaintiff, giving leave to his counsel to move to set aside the nonsuit.

Vaughan, Serjt., now moved for a rule to show cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff for £119. He contended that although the plaintiff, by not giving notice of the non-payment by the acceptor of the bill for £117 11*s.* 2*d.*, had lost his remedy thereon against the defendant, still that circumstance did not preclude him from suing him upon the first bill; and he cited the case of Warrington *v.* Furbor,[1] where it was held that in an action by a guarantee for money paid on account of one who had bought goods, and who, having accepted a bill for the price, had failed to pay it when due: the guarantee was not obliged to give evidence of any demand of payment made on the defendant as acceptor of the bill. But the court held that the case cited did not apply. Here the defendant had first given a bill on which he was liable as acceptor; and then, for a security, he had delivered to the plaintiff a bill, on which the defendant himself had a right to sue other persons: the plaintiff, by not giving him due notice of the dishonor of the last-mentioned bill, had put it out of his power to recover what was due thereupon; and, having so done, he shall not be permitted to resort to the first bill. *Rule refused.*[2]

[1] 8 East, 24.

[2] Phillips *v.* Phillips, Freem. C. C. 247; Darrach *v.* Savage, 1 Show. 155; Hill *v.* Lewis, Skin. 410 (*semble*); Smith *v.* Wilson, Andrews, 187, 228; Denniston *v.* Imbrie, 3 Wash. 396; Brown *v.* Cronise, 21 Cal. 386; Green *v.* Cummins, (Kentucky, Sept. 1878) 6 Reporter, 524; Jennison *v.* Parker, 7 Mich. 355; Phœnix Co. *v.* Allen, 11 Mich. 501; 13 Mich. 191; Whitten *v.* Wright, 34 Mich. 92; Stam *v.* Kerr, 31 Miss. 199; Snyder *v.* Finley, Coxe, 48; Brower *v.* Jones, 3 Johns. 230; Jones *v.* Savage, 6 Wend. 658; Dayton *v.* Trull, 23 Wend. 345; Woodcock *v.* Bennet, 1 Cow. 711; Mehlberg *v.* Tisher, 24 Wis. 607, *accord.*

In Gallagher *v.* Roberts, 2 Wash. C. C. 191; McCrary *v.* Carrington, 35 Ala. 698, it was held that a failure to exercise the usual diligence in making presentment and giving notice of dishonor would not deprive the creditor of his remedy upon the original claim, unless his laches caused actual damage to the debtor. But this view is not to be supported. In Kephart *v.* Butcher, 17 Iowa, 240, this exceptional doctrine, although conceded to be inapplicable to a *bill*, was upheld in the case of a *note* indorsed by the debtor alone. See Hamilton *v.* Cunningham, 2 Brock. 350. — Ed.

SWINYARD AND OTHERS v. BOWES.

IN THE KING'S BENCH, MAY 2, 1816.

[*Reported in 5 Maule & Selwyn*, 62.]

ASSUMPSIT for goods sold and delivered. Plea, *non assumpsit*. At the trial before Bayley, J., at the last Kent assizes, the case was this: the defendant being indebted to the plaintiffs for materials furnished for the building of a mill, and one Chesner being indebted to the defendant for the building of the said mill, Chesner with the consent of the defendant allowed the plaintiffs to draw on him by a bill for £126 payable at two months to the order of the plaintiffs, which bill Chesner accepted. When the bill became due, which was on the 4th February, 1815, it was presented for payment and dishonored, but not protested or noted; nor was any notice of the dishonor given to the defendant until after the 11th February, on which day Chesner became bankrupt. The defendant's name was not on the bill; and it was proved that Chesner was not in a condition between the 4th and 11th February to pay the bill. It was objected to the plaintiffs' right to recover, that, as they had failed to give notice to the defendant of the dishonor of the bill, they had by their laches made the bill their own, and the same was to be esteemed a complete payment of the debt, under the 8 & 4 Anne, c. 9, § 7. But the learned judge overruled the objection, for that notice was only required by the custom of merchants to be given to such as was a party to the bill, which the defendant was not; nor did it appear that he had suffered any damage by reason of the want of notice. A verdict was found for the plaintiffs.

Taddy now renewed the objection upon a motion to set aside the verdict, and contended that the object of the above-cited clause of the statute was to compel all persons who received a bill in satisfaction of a former debt to take the due course to obtain payment, and to give notice of non-payment to the person from whom they received it, under the penalty of the same being considered complete payment. That the statute was for this purpose in aid of the law-merchant, which already provided notice to such as were parties to the bill. And he referred to Bishop *v.* Rowe.[1]

LORD ELLENBOROUGH, C. J. The defendant was not entitled to notice, because he was not a party to the bill. The statute does not require notice to be given to strangers; and, as to its operating to make the bill complete payment, I cannot consider that the bill was

[1] 3 M. & S. 362.

accepted in satisfaction of the debt: it was perfectly collateral; if it had been paid, well; not being so, the debt remains.

BAYLEY, J. There was positive evidence by Chesner that he never could have paid the bill, and therefore the defendant could not have suffered for want of notice.

Per Curiam. Rule refused.[1]

CAMIDGE v. ALLENBY.

IN THE KING'S BENCH, HILARY TERM, 1827.

[*Reported in 6 Barnewall & Cresswell, 373.*]

ASSUMPSIT. The declaration contained counts for goods sold and delivered, and the common money counts. Plea, *non assumpsit*. At the trial before Hullock, B., at the York Lent assizes, 1826, a verdict was found for the plaintiff for £24, subject to the opinion of this court on the following case: —

This action was commenced to recover the sum of £24 alleged to be due from the defendant to the plaintiff for a quantity of corn sold and delivered by the plaintiff to the defendant at York, in the morning of Saturday the 10th day of December, 1825. On the same day, at three o'clock in the afternoon, the defendant delivered to the plaintiff at York, and the latter then and there received as and for a payment of the price of the corn, four promissory notes for £5 each, and four such notes for £1 each, of the bank of Messrs. Dobson and Sons, bankers at Huddersfield, in the county of York. The notes were in the following form, and the defendant's name was not written upon them.

"No. HUDDERSFIELD, Old Bank £5.

"I promise to pay the bearer on demand £5 value received, 1st day of July, 1823.

"Entered, &c. For John Dobson and Sons.

"£5. W. DOBSON."

At eleven o'clock in the forenoon of the same 10th of December, Dobson and Sons stopped payment, having on the same morning and up to that hour paid all demands made upon them. They never after-

[1] Van Wart v. Woolley, 3 B. & C. 439; Goodwin v. Coates, 1 M. & Rob. 221; Hamilton v. Cunningham, 2 Brock. 350 (*semble*); Gibson v. Toby, 58 Barb. 191; M'Lughan v. Bovard, 4 Watts, 308; Ormsby v. Fortune, 16 S. & R. 302, *accord*.

See Bishop v. Rowe, 8 M. & Sel. 362.

Conf. the cases, *supra*, p. 112, note 1, in which it is held that the guarantor of a bill or note is liable without notice of dishonor, unless the want of notice has caused him to suffer actual detriment. — ED.

wards resumed their payments, and shortly afterwards became bankrupts, and the plaintiff never received any part of the amount due on the notes. Huddersfield is distant from York about forty miles, and from Laythorn, the plaintiff's residence, fifty-two miles. At the time when the above notes were paid by the defendant to the plaintiff, neither of them knew that Dobson and Sons had stopped payment or were insolvent. The plaintiff never circulated the notes, nor did he ever present them to Dobson and Sons, the makers, for payment; but, on Saturday the 17th of the same month of December, the plaintiff required the defendant to receive back the notes, and to pay him the amount of them, which the defendant then and ever since has refused to do.

Dodd, for the plaintiff. The plaintiff is entitled to recover the price of his corn, unless he has by laches made the notes his own. It will be contended that he has done so: first, by not having presented the notes for payment; secondly, by not having offered to return them to the defendant earlier than he did. But presentment for payment was not necessary in this case, because the defendant was not a party to the notes, and cannot under the circumstances be damnified by the neglect to present them. This case differs from the several cases where, bankers' notes having been taken before the bankers had stopped, presentment has been held to be necessary within a reasonable time after taking them. Here the notes were taken after the bankers had stopped, and they never resumed their payments. The defendant, therefore, cannot have been prejudiced by reason of the notes not having been presented for payment. If an action upon the notes had been brought against the bankers, or if the defendant had been an indorser, in either case it would have been necessary to aver and prove presentment for payment. But here the action is not brought upon the notes, nor is the defendant a party to them, and therefore he cannot insist on the want of presentment as a defence to this action. The distinction seems to be between persons merely passing bills or notes without being parties to them, and drawers and indorsers who are parties to them. In Warrington *v.* Furbor,[1] the vendee of goods having accepted a bill of exchange for the price, and becoming bankrupt before the bill was due, it was held that a guarantee of the acceptance, who paid the vendor the amount of the bill after the bankruptcy of the vendee, might recover the money from the latter without proving that any presentment was made to the acceptor before such payment by the guarantee, and that upon the ground that the liability not being upon the bill itself, but upon the guaranty, a presentment to the bankrupt

[1] 8 East, 242.

acceptor was unnecessary. That case is an authority to show that a person who is not a party to a bill cannot complain of laches or want of notice, unless it has done him an actual prejudice; and Swinyard v. Bowes also shows that a person who is not a party to a bill cannot complain of laches in not giving him notice of dishonor by the acceptor, as he might do if he were a drawer or indorser; and Murray v. King[1] is to the same effect. In Phillips v. Astling,[2] the want of presentment was held to be a good defence to an action brought upon a guaranty given for the price of goods to be paid for by a bill; but this was on the ground that the acceptor at the time when the bill became due was solvent. In Holbrow v. Wilkins,[3] the plaintiff sold goods for the price of which the vendees accepted a bill, and the defendant guaranteed half the amount; but before the bill was due the vendees became insolvent, of which the defendant was then informed, and also that the plaintiffs looked to him for the sum which he had guaranteed. The bill was not presented for payment; and, in an action brought against the defendant as guarantee, it was held that the want of presentment was no defence to the action. That is an authority to show that, in an action against a guarantee not party to a bill or note, presentment for payment is unnecessary when the acceptor or maker is insolvent at the time the bill becomes due. These several authorities establish that the want of presentment is no defence in this action, the defendant not being a party to the bill, and not being actually damnified by the neglect to present. The defendant here merely passed the notes to the plaintiff in payment of a debt: he did not transfer them to the plaintiff as indorsee; he may be considered, therefore, in the light of a mere guarantee of the debt. As indorser, he would have been liable only according to the usage and custom of merchants, and in that case a neglect to present would be a breach of the obligation imposed by the law-merchant on the party taking the bill to do all that is necessary to obtain payment from the acceptor, and to give due notice to the drawer and indorsers. The statute of 3 & 4 Anne, c. 9, § 7, does not assist the defendant, since its terms do not apply to notes payable to bearer, but to bills of exchange only. It may be conceded that, if the bankers had not stopped before the time when the notes ought in due course to have been presented, the holders would have been guilty of laches by not having presented them; but here the bankers had stopped even at the very time when the notes were paid to the plaintiff. Such notes pass from hand to hand like cash, and it would be highly inconvenient to require every person taking them after the stoppage of a bank to send them from any distance for presentment, when such presentment has

[1] 5 B. & A. 165. [2] 2 Taunt. 206. [3] 1 B. & C. 10.

become by the stoppage useless and nugatory. Then, as to the second point, there could be no legal obligation on the plaintiff to return the notes to the defendant any further than as the returning of them might operate as notice to the defendant that the makers had refused payment. It was the bounden duty of the defendant to take notice that the bankers had stopped payment; for a person who passes bankers' notes to another must be considered impliedly to undertake at the time when he passes them that the makers of the notes are then solvent and in condition to pay them; and, if they are not, there is a breach of this implied guaranty. The fact of their insolvency must be taken to be a matter rather within the knowledge of the party passing the notes than of the person receiving them. Notice of non-payment to the drawer of a bill is required on the presumption that he has funds in the hands of the acceptor; and notice to the indorser is required, in order to enable him to take his remedy over against the drawer; but here the defendant was neither drawer nor indorser of the notes. There is no ground for presuming that a mere passer of bankers' notes has any funds in the hands of the bankers; nor has he, like the indorser of a bill or note, any remedy over against a third party on the instrument. It cannot reasonably be presumed, therefore, that the defendant could have derived benefit from having earlier notice of the dishonor of the notes. If he had in fact sustained any damage by reason of the want of notice, that fact should have been proved, as, for instance, if he had paid any money to the bankers after the stoppage, without setting off the sum due on the notes, and to that extent he would be entitled to be indemnified; but here he has sustained no such damage.

Cresswell, contra. By the statute 3 & 4 Anne, c. 9, § 7, it is enacted "that if any person doth accept any bill of exchange, for and in satisfaction of any former debt, the same shall be accounted a full and complete payment of such debt, if such person accepting any such bill for his debt doth not take his due course to obtain payment thereof by endeavoring to get the same accepted and paid." Here there was a former debt, the notes were taken for that debt, and the plaintiff did not take his due course to obtain payment thereof. It is clear, therefore, that, unless bills of exchange stand upon a different footing from promissory notes, the debt for which the notes in question were given has been satisfied. But since the statute 3 & 4 Anne, c. 9, there is no distinction in this respect between a promissory note and a bill of exchange. In Bayley on Bills, p. 171, it is laid down that the receipt of a bill or note implies an undertaking from the receiver to every party to the bill or note who would be entitled to bring an action on paying it to present in proper time the one, where necessary, for

acceptance, and each for payment; to allow no extra time for payment, and to give notice without delay to such person of a failure in the attempt to procure a proper acceptance or payment. This is the general rule, and there are many cases where it has been held that the insolvency of the drawer and acceptor of a bill of exchange does not dispense with the necessity of notice. Russell *v.* Langstaffe,[1] Howe *v.* Bowes,[2] Rohde *v.* Proctor.[3] In Esdaile *v.* Sowerby,[4] the insolvency of the drawer and acceptor, and the knowledge of that insolvency by the defendant, was held not to dispense with the necessity of a demand of payment, and notice to the defendant of the dishonor of the bill; and it was there said that notice means something more than knowledge, because it was competent to the holder to give credit to the maker. From this it would seem that the holder of a bill or promissory note, by neglecting to present it, is considered as giving a new credit to the acceptor or maker; and this view of the subject is taken by Pratt, C. J., in the case of Moor *v.* Warren. There the defendant at two o'clock in the afternoon gave the plaintiff a banker's note, and he tendered it in payment the next morning at nine: the banker stopped a quarter of an hour before. In that case, Pratt, C. J., told the jury that the loss should fall on the defendant, there being no laches in the plaintiff, who had demanded the money as soon as was usual in the course of dealing, and that keeping the note till next morning could not be construed giving a new credit to the banker; and the jury found for the plaintiff. And in Holme *v.* Barry the circumstances were the same, and King, C. J., of the Common Pleas, gave a similar direction, and the jury found accordingly. But it follows from these cases that if a new credit had been given the loss would have fallen upon the holder of the instrument. In Cory *v.* Scott, the rule is well laid down that notice of dishonor must be given to all parties, who, upon paying the bill or note, would be entitled to a remedy over against some prior party; and, in Dennis *v.* Morrice, Lord Kenyon refused to receive evidence that no actual damage had been sustained from the neglect to give notice. Here the defendant, upon taking up the notes in question, would clearly have had a remedy over by action against Dobson & Co. If, then, the insolvency of the maker does not render notice of the dishonor unnecessary, and the defendant according to the general rule was entitled to notice, the only remaining question is whether it makes any difference that the notes were paid away by him after Dobson & Co. had stopped payment. There is no case precisely in point; but in principle there is no difference between this case and Beeching *v.* ———, where it appeared that

[1] Doug. 514.
[2] 16 East, 112; 5 Taunt. 30.
[3] 4 B. & C. 517.
[4] 11 East. 114.

a note of a country bank was given in payment while the bank continued open, but before the time allowed by the law-merchant for presentment had expired, the bank failed, yet it was held that the holder was bound to present the note for payment in due time, and by neglecting to do so made it his own. The cases of Warrington *v.* Furbor and Swinyard *v.* Bowes are wholly inapplicable: there the party, relying upon the want of notice, was unconnected with the instrument, and would not by paying it have acquired any remedy over against prior parties.

BAYLEY, J. I think that the defendant in this case is entitled to the judgment of the court. One short observation disposes of Warrington *v.* Furbor and Swinyard *v.* Bowes, the authorities cited to show that it was not necessary in this case to prove presentment for payment. In those cases, the person insisting on the want of presentment was not a party to the bill; but here the defendant was a party to the notes, for they were payable to the bearer on demand, and he was the holder of them, and, when such notes are passed from hand to hand, the person taking them must trace his right through the former holder. If the notes had been given to the plaintiff at the time when the corn was sold, he could have had no remedy upon them against the defendant. The plaintiff might have insisted upon payment in money. But, if he consented to receive the notes as money, they would have been taken by him at his peril. If, indeed, he could show fraud or knowledge of the maker's insolvency in the payer, then it would be wholly immaterial whether they were taken at the time of sale or afterwards. Here the notes were given to him in payment subsequently, and the question is whether they operate as a discharge of the debt due to the plaintiff in respect of the corn. The rule as to all negotiable instruments is that, if they are taken in payment of a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instrument does all that the law requires to be done, in order to obtain payment of them. Then the question is, what it was the duty of the plaintiff to do, in order to obtain payment of these notes. They were intended for circulation. But I think that he was not bound immediately to circulate them, or to send them into the bank for payment; but he was bound within a reasonable time after he had received them either to circulate them or to present them for payment. Now here it is conceded that, if there had not been any insolvency of the bankers, the notes should have been circulated or presented for payment on the Monday. It is clear that the plaintiff on that day might have had knowledge that the bankers had stopped payment; and having that knowledge, if presentment was unnecessary, he had then another duty to perform. In consequence

of the negotiable nature of the instruments, it became his duty to give notice to the party who paid him the notes that the bankers had become insolvent, and that he the plaintiff would resort to the defendant for payment of the notes, and it would then have been for the defendant to consider whether he could transfer the loss to any other person, for, unless he had been guilty of negligence, he might perhaps have resorted to the person who paid him the notes. That party would, however, be discharged, if he received no notice of non-payment, or of the insolvency of the bankers till a week after he had paid them to the defendant. The neglect, therefore, on the part of the plaintiff to give to the defendant notice of the insolvency of the bankers, may have been prejudicial to the defendant. The law requires that the party on whom the loss is to be thrown should have notice of non-payment, in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note. Now, here, if the notes had been returned on the Tuesday to the defendant, he might have taken steps against the bankers, and he had a right to exercise his judgment whether he would do so or not, although they had stopped, or he might have had a remedy against the person who had paid him the notes. It may be hard in some cases that the entire loss should fall upon any one individual; but it is a general rule applicable to negotiable instruments, and not to be relaxed in particular instances, that the holder of such an instrument is to present promptly or to communicate without delay notice of non-payment, or of the insolvency of the acceptor of a bill or the maker of a note; for a party is not only entitled to knowledge of insolvency, but to notice that in consequence of such insolvency he will be called upon to pay the amount of the bill or note. The case of Beeching *v.* ——— is an answer to the whole of the argument for the plaintiff, founded upon the fact that the notes were paid away after the bank had stopped. For these reasons, I am of opinion that the plaintiff is not entitled to recover, and that a judgment of nonsuit ought to be entered.

Holroyd, J. I think that, under the circumstances of this case, the plaintiff is not entitled to recover. The notes were paid by the defendant and received by the plaintiff as money; and having been paid and received as money, and both parties being innocent, and the notes being what they imported to be, it seems to me that they must, according to the case of Miller *v.* Race, operate as payment. But, without deciding that the plaintiff was debarred in the first instance from electing to consider them either as negotiable instruments or as money, I think they operated as payment, and that the plaintiff, by not taking due steps to obtain payment, lost his right to return them to

the party from whom he received them; for, although bills and notes delivered as satisfaction of a debt, do not in general operate as a satisfaction unless they turn out to be valuable, yet the case is otherwise if due steps are not taken to obtain payment from the party who is in the first instance bound to pay them. The instruments in question are, in point of law, promissory notes, and therefore due diligence ought to have been used to obtain payment; and, if payment had been refused, notice ought to have been given of that refusal. Now, here the notes were not presented for payment. It is true that, at the time when the plaintiff ought to have presented them for payment, the bankers had become insolvent; but, that being so, the plaintiff ought then, at all events, to have given notice to the defendant that the bankers had become insolvent, and that he, the plaintiff, therefore required him, the defendant, to pay them. Not having done so, I think the plaintiff is not entitled to recover.

LITTLEDALE, J. I think the plaintiff is not entitled to recover. If the notes were taken as negotiable instruments, then they were taken subject to a condition, that the holder would do all that was required to obtain payment in that case; and they ought to have been presented for payment within a reasonable time, or at least notice of the insolvency of the bankers ought to have been given to the defendant. If they were taken as money, absolutely and without any condition, then the plaintiff took them for whatever they might be worth. It would be otherwise if they were forged, for then they would not be what they purported to be; but here they were what they purported to be. I think that there is no guarantee implied by law in the party passing a note payable on demand to bearer, that the maker of the note is solvent at the time when it is so passed.[1]

Judgment of nonsuit.[2]

HENDERSON v. APPLETON.

AT CHAMBERS, BEFORE BAYLEY AND HULLOCK, JJ.,[3] JULY 23, 1827.

[*Reported in Chitty, Bills* (10*th ed.*), 246, *note* 4.]

ASSUMPSIT for goods sold. Plaintiff sold goods to defendant at Denlington market, on Monday, 12th December; and, on account of

[1] As to the existence of an implied warranty by the transferror of a bank-note that it is redeemable at the time of transfer, see Rogers *v.* Langford, 1 Cr. & M. 640, 642; Timmins *v.* Gibbins, 18 Q. B. 724, 726. — ED.

[2] Rogers *v.* Langford, 1 Cr. & M. 637 (*semble*); Guardians *v.* Greene, 1 H. & N. 884 (*semble*), *accord.* — ED.

[3] This case was tried in the Court of Pleas at Durham.

the alarm respecting bankers, it was agreed that the payment should not be made till the Monday following, the 19th December, when the parties again met at Denlington market, and defendant offered several country notes, and offered plaintiff the choice, and he selected and took two £5 notes of Hutchinson's Stockton Bank, and in the evening went home to Husworth. By the course of the post, the notes could not have been presented at the bank at Stockton till Wednesday, the 21st December. It was proved that the bank paid all day on Saturday, the 17th December, but did not pay on Monday or afterwards, and refused to pay any notes after Saturday. On Wednesday, the 21st, the plaintiff met the defendant at Stockton, and offered to return or exchange the same with the defendant; but he refused, saying that the bank was going (meaning paying) on Tuesday. Verdict for plaintiff. On motion for a new trial, BAYLEY, J., said he believed the ground of the decision in Camidge and Allenby was that the notes should be deemed a payment, unless returned in a reasonable time; and that the plaintiff, by keeping the notes a week after he heard of the stoppage, without notice to the defendant, had precluded himself from recovery; but that here the plaintiff had offered to return, and the defendant had refused to take back the notes, and therefore plaintiff was entitled to recover; and HULLOCK, B., concurring, the rule for a new trial was discharged.[1]

[1] Robson *v.* Oliver, 10 Q. B. 704; Magee *v.* Carmack, 18 Ill. 289; Frontier Bank *v.* Morse, 22 Me. 88; Fogg *v.* Sawyer, 9 N. H. 365; Lightbody *v.* Ontario Bank, 11 Wend. 1; 13 Wend. 101, s. c.; Westfall *v.* Braley, 10 Oh. St. 188; Wainwright *v.* Webster, 11 Vt. 576; Townsend *v.* Racine Bank, 7 Wis. 185, *accord.*

In Robson *v.* Oliver, *supra*, Patteson, J., delivered the following opinion:—

"PATTESON, J. This is an action for goods sold and delivered. The fourth plea is that the defendants gave certain promissory notes, payable on demand, on account of the debt; and that these notes were not presented either at Dover or in London within a reasonable time. If the plea rested here, it would be good. If A gives B a promissory note made by another person (not his own, as in Price *v.* Price), payable either on demand or at a future day, and the note is taken in account, B must present it in a reasonable time, just as if it had been indorsed to him. The replication justifies the non-presentment, on the ground that the makers of the notes at Dover were insolvent even at the time the notes were so given in account, though the fact was unknown to the plaintiff: it, therefore, did not come to the plaintiff's knowledge until after he received the notes, though still within a reasonable time for presentment; and the plaintiff, within a reasonable time after he thus knew of the fact, offered to return the notes. The defendants rejoin that the plaintiff did not give them notice of the insolvency of these parties within a reasonable time; that is, they admit that the notice was in a reasonable time after the plaintiff became cognizant of the facts, but say that it was not given before the expiration of the time for presentment. I can see no reason for this being necessary. Suppose these notes had been sent to an agent at Dover for presentment at Dover, and the agent had gone there with a view to present them, and had found no one to receive them: this

ALDERSON v. LANGDALE.

IN THE KING'S BENCH, MAY 11, 1832.

[*Reported in* 3 *Barnewall & Adolphus*, 660.]

ASSUMPSIT by the plaintiff, as indorsee, against the defendant, as drawer, of a bill of exchange. Count for goods sold, &c. Plea, general issue. At the trial, before Lord Tenterden, C. J., at the London sittings after Trinity term, 1831, it appeared that the bill was given by the drawer to the indorsee in payment for goods sold. The indorsee, after the bill had been accepted, altered the time of payment mentioned in it from four to three months. Lord Tenterden was of opinion that, the bill being thereby vitiated,[1] the plaintiff might resort to the original consideration, and recover the price of the goods, although the defendant might have a cross action against the plaintiff for the special damage sustained by the alteration of the bill; and he directed the jury to find a verdict for the plaintiff, but reserved liberty to the defendant to move to enter a nonsuit. A rule *nisi* having been obtained for that purpose,

Kelly, on a former day in this term, showed cause. The bill having, by reason of the alteration, become wholly null and void, the plaintiff was remitted to his original rights, and may recover the price of the goods sold. The acceptor of a bill is supposed to have in his hands money belonging to the drawer, and the latter to give the payee an order for payment of that money. If such order afterwards becomes nugatory, it still is against conscience for the acceptor to retain the money of the drawer; and he is therefore liable in an action for money had and received. A bill accepted on a wrong stamp has been held to be no payment by the acceptor, even though the acceptor would have

might have occurred on the last day on which presentment could be made, and too late to give notice to the defendants until that time had elapsed. On the whole, therefore, the replication sufficiently excuses the non-presentment. If, indeed, time had been suffered to elapse before the plaintiff gave notice of the facts to the defendants, the case would have been very different. By letting such time elapse, he would have rendered the notes his own; and the maker's insolvency would have made no difference. The limit of time as regards the notice is, not that it must be in time for presentment, but that it must be within a reasonable time after knowledge. And the notice having been given in this case within a reasonable time after knowledge distinguishes it from Camidge *v.* Allenby, which was decided on the ground of *laches*, as is remarked by Bayley, B., in Henderson *v.* Appleton, and in Rogers *v.* Langford." — ED.

[1] Tidmarsh *v.* Grover, 1 M. & S. 735; Macintosh *v.* Haydon, R. & M. 362; Long *v.* Moore, 3 Esp. 155, n.

honored it, if it had been presented in time.[1] The parties to such a bill are in precisely the same situation as they were before it was drawn. Then, if the drawer of a bill has in such a case a remedy against the acceptor, surely an indorsee, who has given the drawer value for the bill, must have a remedy against the latter when it becomes of no value. He is then in the same situation as if the bill had never been drawn, and is entitled to recover the value of his goods. There is no express authority upon this point; but it may be inferred from Pierson v. Hutchinson that, if a bill be lost and not destroyed, there can be no remedy in respect of it at law, unless it was in such a state, when lost, that no person but the plaintiff could have acquired a right to sue on it. Now, here the bill was in such a state that no person could have acquired that right. It is true that the drawer may be prejudiced in his remedy against the acceptor by the result of the alteration; but in this, as in any other instance of special damage arising from that circumstance, an action on the case may be maintained against the party in fault for the amount of damage really sustained. A different rule might be productive of great injustice. Suppose the bill accepted for the accommodation of the drawer, or in part for his accommodation, the acceptor having received but a small part of the amount of the bill. In the first case, the drawer would sustain no injury by the alteration of the bill; and yet, if the indorsee could not resort to the consideration, he must lose his just debt, and the drawer escape payment. In the second case, if an acceptance has been given for £1,000, when £50 only was due, the drawer will have indorsed the bill in payment of a debt of £1,000 at the expense of £50 only.

Platt, contra. The plaintiff, by altering the bill in a material part, has rendered it of no value, and by laches made it his own. Now, it is well established that in such a case the bill operates in satisfaction of any debt for which it was originally given. That applies to the present action. This is not analogous to the case of a bill drawn on an improper stamp, because in that case there never was a valid bill in existence. Here a bill, originally valid, was rendered void by the act of the plaintiff. It is not correct to say that the drawer in such a case has always his remedy left against the acceptor. An acceptance given in satisfaction of a claim in respect of which no action can be maintained — as to a physician for fees, or in consideration of a promise, not in writing, to pay the debt of another — may be enforced; but, if the bill be destroyed, the remedy is wholly lost. Permitting the plaintiff to recover in this action, and allowing the defendant to bring a cross action for the special damage occasioned by the destruction of

[1] Wilson v. Vysar, 4 Taunt. 288.

the bill, would lead to a multiplicity of suits in the same matter, which the law discourages. *Cur. adv. vult.*

Lord Tenterden, C. J., now delivered the judgment of the court, and, after stating the facts of the case, proceeded as follows: —

In this case, we have come to the conclusion that the opinion which I expressed at the trial, namely, that the plaintiff was entitled to recover on the count for goods sold, cannot be supported. It is perfectly clear that a bill of exchange will operate as a satisfaction of a preceding debt, if the holder make it his own by laches, — as by not presenting it for payment when due. Here, we think that the plaintiff, by altering the bill in a material part, made it his own as against the defendant, and caused it to operate as a satisfaction of the debt for which it was originally given. Allowing the plaintiff to recover the value of the goods in this action, and the defendant to bring a cross action for the special damage sustained by reason of the destruction of the bill, would lead to a multiplicity of actions, which is against the policy of the law. For these reasons, we are of opinion that the rule for entering a nonsuit must be made absolute. *Rule absolute.*

ATKINSON v. HAWDON.

In the King's Bench, January 27, 1835.

[*Reported in* 2 *Adolphus & Ellis*, 628.]

Assumpsit by drawer against acceptor of a bill of exchange stated to have been made on the 28th of December, 1833, for £19, payable to plaintiff two months after date. Counts for goods sold and delivered, and on an account stated. First plea, to the first count: that the defendant did accept the said supposed bill of exchange, but that the same, when he accepted it, was dated on a certain day other than the day in that behalf in the declaration mentioned, viz. the 30th of December, 1833; and that the plaintiff, after the defendant accepted the said bill, and after the same had been issued and complete, viz. on, &c., without the privity or assent of the defendant in that behalf, and without the said bill being restamped, altered the said bill in a material part, viz. by altering the day of the date thereof from the said 30th, &c., to the 28th day of December, 1833.[1] Verification. Second plea, as to the alleged cause of action in respect of goods: that

[1] See Cock v. Coxwell, 2 Cro. M. & R. 291.

after the making of the promise in respect of that cause of action, and before the commencement of this suit, viz. Dec. 30th, 1833, an account was stated between the plaintiff and defendant of and concerning the last-mentioned cause of action; and upon that occasion the defendant was found indebted to the plaintiff in the sum of £19, for which sum the plaintiff, on the last-mentioned day, made his bill of exchange, payable to the plaintiff or order, two months after date, and directed to the defendant, who accepted the same for and on account of the said £19 so due and owing from him to the plaintiff. Verification. Third plea, as to the account stated, *non assumpsit.*

Replication, as to the second plea, that although true it is that the defendant was found to be in arrear and indebted to the plaintiff in the sum of £19, and that the plaintiff did make, and the defendant did accept, the bill of exchange in the second plea, mentioned on account of that sum in manner and form, &c., nevertheless the plaintiff saith that before the commencement of this suit the said bill of exchange in the said second plea mentioned became due, and the defendant did not then, or at any other time before or since the said bill became due, and before the commencement of this suit, pay the said sum of money in the said bill of exchange mentioned, or any part thereof. Verification. As to the rest of the declaration, *nolle prosequi.*

Rejoinder. That after the defendant had accepted the said bill in the said second plea mentioned, and after the same had been issued and complete, viz. on the 30th of December, 1833, he, the plaintiff, without the privity or assent of the defendant in that behalf, and without the said bill being restamped, altered the said bill in a material part, viz. by altering the day of the date thereof to the 28th of December, 1833. Verification. General demurrer and joinder.

Busby, in support of the demurrer. The rejoinder is no answer to the replication. The bill being altered in a material respect by the plaintiff, one of the original parties to the instrument, he was remitted to the debt in consideration of which it was given. Sutton *v.* Toomer.[1] It has, indeed, been decided that, in consequence of a bill being altered, the holder's remedy for his debt was altogether gone. Alderson *v.* Langdale. But there the defendant was the drawer; and the plaintiff, who had altered the bill, was an indorsee. He, by such alteration, had deprived the drawer of his remedy against the acceptor, and could not therefore sue the drawer upon the original consideration. But here the parties are drawer and acceptor: the acceptor is not put in any worse situation by the destruction of the bill; and, it not being paid, there is no reason that the drawer should not recover

[1] 7 B. & C. 416.

for the original debt. Besides, the rejoinder does not show when the alteration took place: it may have been after the bill was due and dishonored.

Wightman, contra. The distinction between a drawer and an acceptor sued upon a vitiated bill must be admitted; and the rejoinder is, therefore, bad. But the replication is also bad. It merely alleges that the bill mentioned in the second plea became due, and the defendant did not pay it. No particular laches is imputed. Taking the case upon the statement in the replication, it does not appear that the plaintiff still holds the bill: indeed, it may be presumed that, if he did, he would sue upon it. Then, if the bill is indorsed and outstanding, and the defendant liable to be called upon by the holder, the plaintiff cannot resort to the original consideration. [Lord Denman, C. J. This objection should have been specially pointed out.]

Per Curiam.[1] *Judgment for the plaintiff.*[2]

SARD v. RHODES.

In the Exchequer, Hilary Term, 1836.

[*Reported in* 1 *Meeson & Welsby*, 153.]

Assumpsit against the acceptor of a bill of exchange for £43, drawn by one George Parish, payable three months after date to his own order, and by him indorsed to the plaintiff.

To this count the defendant pleaded, fourthly, that before the said bill became due, he accepted the said bill for the accommodation of the said George Parish, and that there never was any consideration or value for such acceptance, or for the defendant's payment of the said bill, or any part of the amount thereof, whereof the plaintiff had

[1] Lord Denman, C. J., Littledale, Williams, and Coleridge, JJ.

[2] Sutton v. Toomer, 7 B. & C. 416; Warren v. Layton, 8 Harring. 404; Vogle v. Ripper, 34 Ill. 100; Krause v. Meyer, 82 Iowa, 566; Hervey v. Harvey, 15 Me. 357; Morrison v. Welty, 18 Md. 169; Hunt v. Gray, 35 N. J. 227; Merrick v. Boury, 4 Oh. St. 60; Matteson v. Ellsworth, 33 Wis. 488, *accord*.

But the fraudulent alteration of a negotiable security by the holder will bar his right to recover on the original consideration. Martendale v. Follet, 1 N. H. 95; Smith v. Mace, 44 N. H. 553; Clute v. Small, 17 Wend. 238; Kennedy v. Crandell, 3 Lans. 1; Meyer v. Huneke, 55 N. Y. 412 (*semble*); Booth v. Powers, 56 N. Y. 22 *semble*).

Conf. White v. Hass, 32 Ala. 430; Wheelock v. Freeman, 13 Pick. 165; Bigelow v. Stilphens, 35 Vt. 521. — Ed.

notice; and that after the said bill became due, and before the commencement of this suit, to wit, on the first day of August, 1835, the said George Parish made his promissory note in writing, and thereby promised to pay to the plaintiff, or order, £44, divers, to wit, six weeks after date; and then delivered the said note to the plaintiff in full satisfaction and discharge of the said bill and the said cause of action in the said first count mentioned; and the plaintiff then accepted and received the said note in full satisfaction and discharge of the said bill and the said cause of action in the first count mentioned; and this the defendant is ready to verify, &c.

Replication. That although true it is that the said George Parish did make and deliver to the plaintiff the said promissory note in that plea mentioned in full satisfaction and discharge of the said bill and the said cause of action in the said first count mentioned, yet the plaintiff avers that the said promissory note became due and payable according to the tenor and effect thereof, at a day long since elapsed, to wit, the 15th of September, 1835; and that the said promissory note still remains in the hands of the plaintiff wholly unpaid and unsatisfied; and this he, the said plaintiff, is ready to verify, &c.

Demurrer, assigning the following causes: that it is admitted by the replication that the plaintiff took and received the said promissory note from the said George Parish as aforesaid, with notice that the defendant had accepted the said bill in the first count mentioned for the accommodation of the said George Parish, and without consideration or value, as in the said fourth plea alleged; and also that the said George Parish made and delivered the said note to the plaintiff, and he took the same, not merely on account or in payment of the said bill in the declaration mentioned, but in full satisfaction and discharge thereof, and of the cause of action in the said first count mentioned; nevertheless, the plaintiff hath stated, and attempted in answer to the said fourth plea to put in issue, a matter immaterial to the decision of this cause in regard to the said fourth plea; that is to say, that the said note hath not been honored by the said George Parish, and is unpaid; whereas, if, as is admitted, the said note was taken absolutely in satisfaction and discharge of the said cause of action in the first count mentioned, the defendant's liability on the said bill could not revive upon the dishonor of the said note; and the note of a third person may be an absolute discharge and extinguishment of the claim upon a bill of exchange; and also for that it is not alleged in the replication that the said promissory note became due or was dishonored before the commencement of this suit, or was then in the plaintiff's hands; or that the said George Parish was ever requested to pay the same; or that the same was presented for payment; or that the defendant had

any notice of its non-payment, or was after the dishonor of the said note requested to pay the amount of the said bill.

Joinder in demurrer.

In the margin of the demurrer-book, it was stated that the causes of demurrer are those assigned, and chiefly that the non-payment of Parish's note, taken in satisfaction, did not revive the defendant's liability; and that it was not alleged that the note became due before the action was commenced.

Thesiger, in support of the demurrer, was stopped by the court, who called upon —

T. W. Tyndale, contra, who objected to the sufficiency of the plea, and contended that it was no answer to the action; that though the defendant had given a note to the plaintiff in satisfaction of the bill, yet the note having subsequently been dishonored, it did not amount to an absolute discharge of the defendant's liability on the bill. [PARKE, B. It appears that the note was for a larger amount.] It is submitted that it was given as a collateral security. He referred to Richardson *v.* Rickman.[1]

LORD ABINGER, C. B. This is a plea in accord and satisfaction, and the consideration is complete. The plaintiff admits by the replication that he took it in full satisfaction and discharge of the bill.

PARKE, B. The note is in the plaintiff's hands overdue and unpaid, and he may sue upon it. It is averred to have been accepted in full satisfaction and discharge of the bill. The plaintiff, therefore, takes it for better or worse. This is not like the case of Kearslake *v.* Morgan, where it was admitted that the non-payment of the note when due, there being no laches on the part of the plaintiff, would revive the remedy on the original debt, for there it was averred that the indorsement was "for and on account" of the original debt. If it had been averred here that the promissory note was given for and on account of the bill, it might have been different.

Tyndale then obtained leave to amend on payment of costs.

Leave to amend accordingly.[2]

[1] Cited 5 T. R. 517.

[2] Thompson *v.* Percival, 5 B. & Ad. 925; Lewis *v.* Lyster, 2 C. M. & R. 704; Evans *v.* Drummond, 4 Esp. 89; Reed *v.* White, 5 Esp. 122; Sheehy *v.* Mandeville, 6 Cranch, 253; Harris *v.* Lindsay, 4 Wash. C. C. 271; *In re* Morrill, 2 Sawyer, 356; Risher *v.* Frolic, 1 Woods, 92; Abercrombie *v.* Mosely, 9 Port. 145; Anderson *v.* Henshaw, 2 Day, 272; Bonnell *v.* Chamberlin, 26 Conn. 487; Stone *v.* Chamberlin, 20 Ga. 259; Moseley *v.* Floyd, 31 Ga. 564; White *v.* Jones, 38 Ill. 159; Burlington Co. *v.* Green, 22 Iowa, 508; Smith *v.* Young, 11 Bush, 398; White *v.* McDowell, 4 La. An. 543; Burchard *v.* Frazer, 23 Mich. 224; Keough *v.* McNitt, 6 Minn. 513; Lear *v.* Friedlander, 45 Miss. 559; Randlet *v.* Herren, 20 N. H. 102; Arnold *v.* Camp, 12 Johns. 409; Frisbie *v.* Larned, 21 Wend. 450; Roberts *v.* Fisher, 58 Barb. 69; Millerd *v.*

SIBREE v. TRIPP.

IN THE EXCHEQUER, JANUARY 15, 16, 1846.

[*Reported in* 15 *Meeson & Welsby*, 23.]

ASSUMPSIT. The first count was upon a promissory note for £50 the second and third counts were for money had and received, and on an account stated, the sum laid in each of them being £1,000.

The defendant pleaded (with *non assumpsit* and other pleas), fifthly, as to the sum of £500, parcel of the sum in the second and last counts mentioned, that the account stated in the last count was stated of and concerning the said sum of £500, parcel, &c., in the said second count mentioned, and no other; that, after the said causes of action as aforesaid arose, the plaintiff commenced, in the Tolzey Court of Bristol, an action of debt against the defendant, for the recovery of the said sums of £500 and £500; that the defendant disputed the said supposed debt, and denied that he owed or was liable to pay the same, or that the plaintiff could recover it; and thereupon, to terminate the said dispute and difference, and the claim and demand of the plaintiff in the said debt and action, and finally to determine the said action, the plaintiff and defendant agreed that the said action should be settled by the defendant making and delivering to the plaintiff three promissory notes in writing, by which the defendant should promise to pay to the plaintiff, or order, the sums of £125, £125, and £50 respectively, and that the plaintiff should accept and receive the same in full satisfaction and discharge of the said sums of £500 and £500, and all damages and costs, and that the plaintiff should discontinue the said action. Averment, that the defendant made and delivered to the plaintiff the said three promissory notes, and that the plaintiff accepted the same in full satisfaction and discharge of the said sums of £500 and £500 and the damages and costs, &c. Verification.

Thorn, 56 N. Y. 402; Hart v. Boller, 15 S. & R 162; Seltzer v. Coleman, 32 Pa. 493; Wilbur v. Jernegan, 11 R. I. 113; Union Bank v. Smiser, 1 Sneed, 501; Robinson v. Hurlburt, 34 Vt. 115; Blair v. Wilson, 28 Grat. 165; Davenport v. Schram 9 Wis. 119, *accord*.

Tayler v. Baker, 5 Mod. 136; 12 Mod. 86, s. c. (*overruled*), *contra*.

In Cole v. Sackett, 1 Hill, 516; Waydell v. Luer, 5 Hill, 448; Parrott v. Colby, 6 Hun, 57; Jagger Co. v. Walker, 43 N. Y. Sup'r Ct. 275; Lazier v. Nevin, 8 W. Va. 522, it was held that a debtor's own note could not work a satisfaction of his debt. But see Waydell v. Luer, 3 Den. 410; Livingston v. Radcliff, 6 Barb. 201; Neff v. Clute, 12 Barb. 466. — ED.

Replication, that no such agreement was ever made *modo et forma*, &c.; on which issue was joined.

The Lord Chief Baron POLLOCK was of opinion that the plea was proved, and accordingly directed a verdict for the defendant on that issue.[1]

Butt obtained a rule to show cause why there should not be judgment for the plaintiff, notwithstanding the verdict on the above issue.

Jervis and *Hoggins* now showed cause.

Butt and *Taprell*, in support of the rule.

This plea is substantially bad, and the plaintiff is therefore entitled to judgment *non obstante veredicto*. The plea confesses a debt, and seeks to avoid it by an alleged accord and satisfaction; but in truth it is a mere plea of a promise to pay a smaller sum of money in satisfaction of a larger, which, according to all the authorities, is no answer to the declaration. If it had been a gift of a chattel in satisfaction, that would have been different. It is true the plea states the debt to have been disputed on the former occasion, but that cannot destroy the effect of the present admission of it. To make the plea a good answer, it ought to have averred that there was an alleged debt or a mere disputed claim: as it stands, the averment of the debt being disputed is idle and immaterial. On this part of the case, they cited Com. Dig., "Action on the Case," F. 8; Cumber *v.* Wane,[2] Heathcote *v.* Crookshanks,[3] Fitch *v.* Sutton,[4] Greenwood *v.* Ledbitter,[5] Thomas *v.* Heathorn,[6] Down *v.* Hatcher,[7] and Newhall *v.* Holt.[8]

POLLOCK, C. B. The other part of the rule is to enter judgment for the plaintiff *non obstante veredicto*, on the ground that the giving of these notes could not in point of law be a satisfaction of a liquidated claim for a larger amount. If the case of Cumber *v.* Wane were law, and a binding authority upon us, undoubtedly we could not come to a conclusion in favor of the defendant. That case was one of assumpsit for £15, to which the defendant pleaded that he gave the plaintiff a promissory note for £5 in satisfaction, and that the plaintiff received it in satisfaction; and it was held, on writ of error, after judgment for the plaintiff, that the plea was ill. It does not appear from the report whether the note was payable presently, or whether it was negotiable or not. The facts are not sufficiently stated to make it a binding authority. Pratt, C. J., says, in delivering the judgment of the court: "As the plaintiff had a good cause of action, it can only be extin-

[1] The statement of the evidence has been omitted, and only so much of the case is given as relates to the motion for judgment *non obstante veredicto*. — ED.

[2] 1 Stra. 426.
[3] 2 T. R. 24.
[4] 5 East, 230.
[5] 12 Price, 128.
[6] 2 B. & C. 477.
[7] 10 Ad. & E. 121.
[8] 6 M. & W. 662.

guished by a satisfaction he agreed to accept; and it is not his agreement alone that is sufficient, but it must appear to the court to be a reasonable satisfaction, or at least the contrary must not appear, as it does in this case. If £5 be, as is admitted, no satisfaction for £15, why is a simple contract to pay £5 a satisfaction for another simple contract of three times the value? In the case of a bond, another has never been allowed to be pleaded in satisfaction, without a bettering of the plaintiff's case, as by shortening the time of payment." From the latter part of the judgment, I must, with every respect for the great authority of that learned judge, express my dissent. Undoubtedly, at that time it was not law; for in Pinnel's Case [1] it was laid down as clear matter of law that, in the case of a bond for £500, due on the first of January, if the obligee accepted £100 in satisfaction the day before, he was at liberty to do so; and the court never inquired whether the satisfaction was reasonable: they left it to the agreement of the parties. However, it does not appear, in the case of Cumber *v.* Wane, that the promissory note was negotiable, and therefore that the plaintiff had any benefit from it. The marginal note of that case — "Giving a note for £5 cannot be pleaded as a satisfaction for £15" — was expressly denied to be law by Lord Ellenborough, in argument in Heathcote *v.* Crookshanks; and Buller, J., referred to a case of Hardcastle *v.* Howard, in which it had been so denied to be law. But whether the case of Cumber *v.* Wane have been overruled or not, it appears to me that it cannot be sustained as an authority that the acceptance of a negotiable security may not be a satisfaction of a claim to a larger amount. Sard *v.* Rhodes is a distinct authority that the acceptance of a negotiable security may be pleaded in satisfaction of a simple contract debt for a like amount; and the only question is whether the same doctrine is applicable where the original claim was for a larger amount. I think it is. It is admitted that, if there had been an acceptance of a chattel in satisfaction of the debt, the court would not examine whether that satisfaction was a reasonable one, but merely whether the parties came to that agreement; and the acceptance of a negotiable security appears to me to be of the same nature. Again, if a claim is *bona fide* disputable, Longridge *v.* Dorville [2] is an authority to show that the party may be barred by the acceptance of a much less sum in satisfaction of it. Here the demand is apparently for a liquidated amount; but, under the count for money had and received, that amount may be very disputable. And the plea avers that in the former action the defendant disputed the said supposed debt, and denied that he owed or was liable to pay it; and thereupon, to terminate the dispute and difference, &c., the plaintiff and defend-

[1] 5 Rep. 117. [2] 5 B. & Ald. 117.

ant agreed that the action should be settled by the giving of the promissory notes. If so, that was an admission by the plaintiff that the claim was so far disputable as to justify him in coming to such an agreement. Upon the whole, I am of opinion that this plea is a good answer to the action, and that it was proved at the trial, and therefore that this rule ought to be discharged.

PARKE, B. The next question is whether, if proved in fact, this is a good plea in law; and I am of opinion that it is. I will consider it in the way proposed by Mr. Butt, striking out the averments as to its being a disputed debt. It is clear, if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may, under certain circumstances, be evidence of a gift of the remainder. But the gift of a thing of uncertain value may be a satisfaction of any sum due on a simple contract. If the contract be by bond or covenant, it can be determined only by something of an equal or higher nature; but, upon a mere simple contract, it is clear that the debtor may give any thing of inferior value in satisfaction of the sum due, provided it be not part of the sum itself. Littleton thus lays it down, § 344: "Also in case of feoffment in mortgage, if the feoffor payeth to the feoffee a horse, or a cup of silver, or a ring of gold, or any such thing, in full satisfaction of the money, and the other receiveth it, this is good enough, and as strong as if he had received the sum of money, though the horse or other thing were not of the twentieth part of the value of the sum of money, because that the other hath accepted it in full satisfaction." The same doctrine is laid down in Pinnel's Case. It is clear, if the creditor had the money itself, he might buy with it a thing of however inferior value, and that contract would be good; so he may accept the same thing in satisfaction of the whole sum, and that contract is good. In the case of a bond or contract under seal, it is different. "The obligor or feoffor cannot, at the time appointed, pay a lesser sum in satisfaction of the whole, because it is apparent that a lesser sum of money cannot be a satisfaction of a greater; but if the obligee or feoffee do at the day receive part, and thereof make an acquittance under his seal in full satisfaction of the whole, it is sufficient, by reason the deed amounteth to an acquittance of the whole.[1] *Eodem ligamine quo ligatum est dissolvitur.* Again, a sum of money payable at a different time is a good satisfaction of a larger sum payable at a future day. Com. Dig. Accord. (B 2). In the present case (supposing it a liquidated demand), the satisfaction is by giving a different thing, not part of the sum itself, having different properties. It may be of equal value, but that we cannot enter into: it is sufficient that the parties have so agreed. The case of Andrew v. Boughey[2] is an authority in support of this view.

[1] Co. Litt. 212 b. [2] Dyer, 75 a.

There the declaration was for delivering 373 lbs. of bad wax, upon an assumpsit for 400 lbs. of good and merchantable wax, stating half the price to have been paid in hand, the rest to be paid upon a day agreed on. To this the defendant pleaded that, before the time appointed for the delivery of the residue of the wax, "the plaintiff and defendant did agree, that, if the defendant would deliver immediately to the plaintiff one cake of wax weighing 20 lbs., the defendant would accept that in recompense, as well for the aforesaid 373 lbs. as for the residue which was to be delivered, and pleaded this executed in certain, with the acceptance by the plaintiff accordingly;" and this plea was held a good answer. The court say that "the bar seemed good enough, for the effect and substance of the action is that the defendant hath not performed his bargain, *scil.* with good and merchantable wax, according to his undertaking, but that it was corrupted and mixed as above, and deceitful; for which the plaintiff has received satisfaction and recompense by the cake, and his own acceptance, although it were not of one hundredth part of the value of his loss, yet by his own accord and agreement this injury is dispensed with; and in all actions in which nothing but amends is to be recovered in damages, there a concord carried into execution is a good plea." It seems to me that this reasoning applies to the present plea, because here a different thing, of uncertain value, is delivered in satisfaction of the debt.

The cases of Cumber *v.* Wane and Thomas *v.* Heathorn have been referred to. The reasoning of Pratt, C. J., in the former case, is certainly not correct; for we cannot inquire into the reasonableness of the satisfaction. But there it did not appear that the note was a negotiable one; and the point now before the court was not made. In Thomas *v.* Heathorn, it does not appear to have been a case of accord and satisfaction: although the bill accepted by the defendant was a negotiable security, it does not appear that it was given by way of accord and satisfaction.

As to the other question, whether the statement in this plea, that it was a disputed debt, makes the plea a good answer, I think that is very doubtful, because it does not state that it was disputable on fair and reasonable grounds. This question was considered in the case of Wilkinson *v.* Byers,[1] in which it was held that, where an action has been commenced for an unliquidated demand, payment by the defendant of an agreed sum in discharge of such demand was a good consideration for a promise by the plaintiff to stay proceedings and pay his own costs. Littledale, J., there went further than the rest of the court, and expressed his opinion that, even in the case of a liquidated demand, the same promise, made in consideration of the payment of such sum, might be enforced in an action of assumpsit, where the

[1] 1 Ad. & E. 106; 3 Nev. & M. 853.

agreement was such that the court would stay proceedings if the plaintiff attempted to go on. He referred to a case of Reynolds v. Pinhowe,[1] where a declaration in assumpsit, — "that whereas the defendant had recovered £5 against the plaintiff, in consideration of £4 given him by the plaintiff, the defendant assumed to acknowledge satisfaction of that judgment before such a day, and that he had not done it," — was held good, on the ground that it was a benefit to the defendant to have the money without suit or charge. On the authority of that case, Littledale, J., held that, if there was a dispute as to a liquidated debt, the payment and acceptance of a smaller sum might be a good satisfaction. The rest of the court, however, did not go upon that ground, and therefore I do not rest my judgment upon this point. But, for the reasons I have already stated, I think this plea is good, and that there ought not to be judgment for the plaintiff *non obstante veredicto*.

ALDERSON, B. Then the next question is, Is the plea a good one? I consider this as a liquidated demand. Then, Is there a good answer to it? The suggested answer is, that the defendant gave certain promissory notes of a smaller amount, and the plaintiff accepted them in satisfaction and discharge of that demand. It is undoubtedly true that payment of a portion of a liquidated demand, in the same manner as the whole liquidated demand ought to be paid, is payment only in part; because it is not one bargain, but two, — namely, payment of part, and an agreement, without consideration, to give up the residue. The courts might very well have held the contrary, and have left the matter to the agreement of the parties; but undoubtedly the law is so settled. But if you substitute for a sum of money a piece of paper, or a stick of sealing-wax, it is different, and the bargain may be carried out in its full integrity. A man may give, in satisfaction of a debt of £100, a horse of the value of five pounds, but not five pounds. Again, if the time or place of payment be different, the one sum may be a satisfaction of the other. Let us, then, apply these principles to the present case. If for money you give a negotiable security, you pay it in a different way. The security may be worth more or less: it is of uncertain value. That is a case falling within the rule of law I have referred to. But here there is the further circumstance, that the payment was in discharge of a debt then under litigation, by means of a negotiable security, which takes away that litigation. On these grounds, I am of opinion that this plea is good.

PLATT, B. I am of the same opinion. *Rule discharged.*[2]

[1] Cro. Eliz. 429.

[2] Curlewis v. Clark, 3 Ex. 375, *accord*.
Cumber v. Wane, 1 Stra. 426 (*overruled*), *contra*.
Conf. Bunge v. Koop, 48 N. Y. 229; Bliss v. Shwarts, 65 N. Y. 444. — ED.

BELSHAW v. MARY ANN BUSH.

IN THE COMMON PLEAS, TRINITY TERM, 1851.

[*Reported in* 11 *Common Bench Reports*, 191.]

MAULE, J., now delivered the judgment of the court.[1]

In this case, it is first to be considered what is the true meaning of the plea, and secondly whether it be an answer to the claim to which it is pleaded.

The declaration is in debt on simple contract for goods sold and delivered, &c. The plea is pleaded to the demand for "£33 10*s*., parcel of the debt in the declaration, and the causes of action in respect thereof;" and it states that, after the accruing of the causes of action in the declaration mentioned, and before the suit, the plaintiff drew a bill on William Bush, for £33 10*s*., for value received, payable to the plaintiff's order three months after date, which William Bush accepted, and delivered the same so accepted to the plaintiff for and on account of the said sum of £33 10*s*., parcel of the debt in the declaration mentioned, and the causes of action in respect thereof, and the plaintiff then took and received the said bill from the said William Bush for and on such account as aforesaid, and that the plaintiff afterwards indorsed the bill to one William Patrick Gray, who was the holder, and entitled to sue Bush thereon, at the commencement of the suit.

We think that "£33 10*s*., parcel of the debt in the declaration mentioned, and the causes of action in respect thereof," on account of which the plea alleges the bill to have been delivered and received, must be understood to mean the £33 10*s*., parcel of the debt in the declaration mentioned, and the causes of action in the declaration mentioned, in respect thereof, that is, the causes of action of the plaintiff against the defendant.

The declaration shows debts, and goods sold and delivered, &c., by the plaintiff to the defendant; and it is not to be presumed that there were any other causes of action in respect of such debts than those of the creditor against the debtor. In this respect, the plea differs from that in Jones *v.* Broadhurst, where the action was by the indorsees against the acceptor of a bill of exchange, and the plea stated that the drawers delivered to the plaintiffs, and the plaintiffs accepted, divers goods, in full satisfaction and discharge of the bill of exchange, and of all dam-

[1] All that is material to an understanding of the case being contained in this judgment, the rest of the case has been omitted. — ED.

ages and causes of action in respect thereof; and the court held that the drawers, being parties to the bill, and consequently liable to pay it, the satisfaction and discharge mentioned in the plea must be understood to apply to the liability as drawers of those who delivered the goods, and not to that of the defendant as acceptor. In the present case, no liability of any one but the defendant, and no cause of action but those of the declaration, appears. We think, therefore, that this plea is to be understood as meaning that William Bush gave, and the plaintiff took, the bill on account of the defendant's liability to pay the causes of action which the plaintiff had against the defendant in respect thereof.

Understanding the plea in that sense, the next question is whether it be a good answer to the action.

It cannot be questioned that it has been established by many decisions that, if the plea had alleged the bill to have been delivered to the plaintiff by the defendant, instead of by William Bush, and had, in all other respects, been such as it now is, it would have been an answer to the action; but, as no case has been found in all respects resembling the present, it is contended that those decisions will not govern this case, by reason of this difference; and the rather as those decisions have sometimes been considered as anomalous and contrary to established rules of law; that the ground of those decisions is that the giving a bill on account suspends the right of action for the original debt; and that this is contrary to the rule that a personal action once suspended by the act of the party is gone for ever, and also to the rule that a covenant not to sue for a limited time is no bar to an action.

It will therefore be convenient to consider these rules of law, and the decisions which are said to conflict with them.

The rule as to a personal action once suspended, being gone, is referred to by Powell, J., in the terms above mentioned, in Wankford *v.* Wankford,[1] in 10 Wm. III., where it is applied to the case of an obligee making the obligor his executor; which was held to extinguish the debt, so that an administratrix *de bonis non* could not sue the heir of the obligor; and the rule is, undoubtedly, of much greater antiquity, and has also been acted on in recent times, as in Freakly *v.* Fox and Harmer *v.* Steele. But it is not, and never was, true that in no mode and under no circumstances can a personal action be suspended; for, though a simple covenant or agreement not to sue for a limited time be not a bar to an action, it is not inoperative, and so far suspends the right to sue that it prevents its exercise, without subjecting the plaintiff to an action at the suit of the defendant for a breach of the covenant or agreement. But there is a more important excep-

[1] 1 Salk. 299.

tion, which is probably as old as the rule itself, which is adverted to by Holt, C. J., and Dolben, J., in Comberbach, p. 124, where they are reported as saying, "That the rule that a personal action once suspended is for ever extinct, does not hold in all cases." In this report, the exception is not specifically mentioned; but in the report of the same case, in Carthew, p. 63, under the name of Ayloffe v. Skrimpshire, it is said "that it was agreed by all that a letter of license containing the words following, viz. that, if the creditor sue, &c., within such a time, that his debt shall be forfeited, such license is pleadable in bar;" and this is plainly the exception to the rule that is adverted to by Holt, C. J., and Dolben, J., as reported in Comberbach. In Gibbons v. Vouillon,[1] this law was considered and acted on; and it appears from the authorities cited that there have been decisions to the like effect from the 21 Hen. VII.

It is said by the reporter in Fowell v. Forrest[2] that a defeasance is a conditional release; and clauses, that the debt shall be forfeited, or that the deed may be pleaded in bar, if a suit be commenced before a certain time or a certain event, are of common occurrence, and, as the cases cited show, have due effect given to them. In all these cases, the right of action is effectually suspended for the time, or till the condition is performed; and, after the expiration of the time, &c., the action may be maintained, if the plaintiff, by bringing another action before the time, have not forfeited his debt under the provisions of the defeasance, or have not been barred in a former action.

There are, however, some modern cases which have sometimes been considered as infringing on the rule that an agreement not to sue for a limited time without such clause of conditional release or forfeiture is no answer to an action for a cause accrued after the agreement, but only a ground for a cross action, and giving to such an agreement the effect of a bar to an action brought before the expiration of the time. Of these, one of the principal is Stracey v. The Bank of England,[3] where the language of the court, in giving judgment, if looked at without reference to the facts of the case, may seem to give countenance to the notion that an agreement not to sue during a limited time, without any clause of conditional release or forfeiture, is a bar to an action brought during the limited time. But, if the facts of that case be adverted to, the language of the judgment will appear not to have such meaning. It was an action on the case by the plaintiffs against the Bank of England for not transferring some stock of theirs, standing in their books, to one Alder, to whom the plaintiffs had sold it, and had called on the defendants to transfer it to him. The special verdict

[1] 8 C. B. p. 488.
[2] 2 Saund. 48.
[3] 6 Bing. 754; 4 M. & P. 639.

showed a binding agreement between the plaintiffs and the defendants, that the plaintiffs should not call on the defendants to transfer the stock until the plaintiffs had proved or endeavored to prove a debt against the estate of certain bankrupts. After the agreement, and before proof of or attempt to prove the debt, the plaintiffs called on the bank to transfer to Alder; and it was for not complying with that demand that the action was brought. The court were of opinion that, after this agreement, the plaintiffs had no right to call on the bank to transfer before proving or attempting to prove the debt, and consequently that the defendants, in refusing to transfer on the occasion complained of, had done no wrong. It is clear that the right of action declared on had never accrued, and that no action for the refusal complained of in the declaration could be at any time maintained, the duty of which that refusal was complained of as a breach not existing at the time of the refusal. The language of the court in giving judgment is: "The agreement is not set up as a perpetual bar: it is merely insisted on as an objection to the action being brought at the present time. It is urged as an agreement by which the plaintiffs have, for a good consideration, restrained themselves from suing, not perpetually, but only until they shall have first done a particular act." If this be understood as meaning that the agreement is not set up as a perpetual bar to any action that the plaintiffs may at any time bring respecting any refusal to transfer, but only to an action for a refusal after the agreement, and before proof or attempt to prove, — which action is barred by showing that the right to it does not exist; and, if the "restraint from suing, not perpetually, but only until they shall have first done a particular act," be understood as meaning a restraint from calling for a transfer, and suing for a refusal to transfer, the reasons given for the judgment will be applicable to the case, and will conflict with no rule of law; which they certainly would, if understood as affirming that an action may be barred by a mere agreement or covenant not to sue for a limited time. The expressions in question seem, indeed, to have been used by the court only for the purpose of showing that the plaintiffs, though defeated in that action, would not lose their right to the stock, but might claim a transfer after performing what they had agreed to do before claiming it. See the judgment of the Exchequer Chamber in Ford v. Beech,[1] and other cases, in which

[1] 11 Q. B. 852. [In this case, to a count upon a promissory note, a plea of an agreement between plaintiff and defendant and A B, whereby A B was to pay £200 to plaintiff in quarterly payments of £25, and the plaintiff's right of action on the said note was to be suspended until default in payment of the quarterly payments, with an averment that A B made due payment, was held to be no bar to an action upon the note. Parke, B., in delivering the opinion of the court, said, p. 878: "Neither

a suspension of the remedy has been spoken of, and which may, it is conceived, be explained in a like manner, so as to show them to be not inconsistent with the older decisions.

The cases of covenants not to sue for a limited time, with a proviso for forfeiture if an action be brought within the time, are an exception or qualification of the rule that a covenant not to sue for a limited time is no bar, as well as to the rule as to suspension of rights of action. In such cases, the right to sue is effectually suspended for a limited time, and for such time only, if no action be brought before the expiration of the time; and the covenant not to sue for a limited time does operate as a bar, by force of the condition, if the action be brought within the limited time. It would indeed be anomalous and without precedent if it were held that, after a cause of action had accrued, and an action upon it had been barred by force of a release or *defeasance* conditional on its being sued upon before a limited time, another action could be maintained for the same cause after the time. But there is no such decision; and the contrary was determined by this court in a late case of Overton *v.* Harvey,[1] and is assumed in numerous books, in which it is given as a reason why a mere covenant not to sue for a given time is no bar, that, if it were, the debt would be gone for ever, contrary to the intent of the parties.

Now, the cases in which a bill given on account of a debt has been said to suspend the right of action, and been held to be a bar to an action brought before the bill had turned out to be unproductive, are entirely in conformity with the cases establishing the exceptions above referred to. The true principle of the cases on bills seems to be that pointed out by Pollock, C. B., in Griffiths *v.* Owen.[2] In the case of a money demand, if the creditor accepts a promissory note, or an order for the payment of money, on account of the debt, that is a sort of qualified or conditional payment, and may be so pleaded; and by Alderson, B., in James *v.* Williams:[3] "Where bills of exchange have been stated to have been delivered for and on account of a promissory note, or any other sum in the declaration mentioned, there it is to be taken as a conditional payment, and may be so pleaded."

Is the decision in this case inconsistent with the several cases in which it has been held that a party accepting a negotiable security, payable in future, for and on account of an antecedent demand, cannot, until after such negotiable security has become due and been dishonored, sue for such antecedent demand; because, independently of the consideration of how far the acceptance of such negotiable security may be deemed payment for the time, all such decisions seem to be grounded upon the peculiar nature of the negotiable instruments, and are deemed to be necessary exceptions to the general rules of law in favor of the law-merchant."] — Ed.

[1] 9 C. B. 324.

[2] 13 M. & W. 58, 64.

[3] 13 M. & W. 828, 833.

If an agreement were expressly made, that the bill should operate as payment, unless defeated by dishonor, &c., there is no reason why a suit brought while the payment remained undefeated should not be barred by such agreement; and the cases in which a bill given on account of the debt has been held to operate as such payment are to be supported by considering that such an agreement is to be implied by law from giving and receiving such security on account of a debt on simple contract; and the cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty, or for rent, may be accounted for on the ground that the legal implication of an assent that the bill shall operate as a conditional payment does not arise, when, if it did, the plaintiff would be deprived of a better remedy than an action on a bill, as in Davis v. Gyde,[1] in which, the debt being for rent, the plaintiff would part with a remedy by distress; and, as in Worthington v. Wigley,[2] where, the demand being on a bond, the plaintiff might, in certain events, have recourse to other funds than he could in an action on a simple contract.[3]

If a bill given by the defendant himself on account of the debt operate as a conditional payment, and so be of the same force as an absolute payment by the defendant, if the condition by which it is to be defeated has not arisen, there seems no reason why a bill given by a stranger for and on account of the debt should not operate as a conditional payment by the stranger; and, if it have that operation, the plea in the present case will have the same effect as if it had alleged that the money was paid by William Bush for and on account of the debt. But, if a stranger give money in payment, absolute or conditional, of the debt of another, and the causes of action in respect of it, it must be a payment on behalf of that other, against whom alone the causes of action exist, and, if adopted by him, will operate as payment by himself. See Co. Litt. 206 b: "If a stranger,

[1] 2 Ad. & E. 623. [2] 3 New Cases, 454; 4 Scott, 558.

[3] A bill or note will operate as conditional payment, or absolute payment, of a demand by specialty, or for rent or on a judgment, if in fact given and received with such intent. Baker v. Walker, *infra*, p. 659; Hilliard v. Smith, Comb. 19; Lyon v. Northrup, 17 Iowa, 314; Witherby v. Mann, 11 Johns. 518; Ligon v. Dunn, 6 Ired. 133; Dogan v. Ashbey, 1 Rich. 36.

In Tapley v. Martens, 8 T. R. 451; Drake v. Mitchell, 3 East, 251; Curtis v. Rush, 2 V. & B 416; Marsh v. Pedder, 4 Camp. 257; Palfrey v. Baker, 3 Price, 572; Worthington v. Wigley, 3 B. N. C. 454; Davis v. Gyde, 2 A. & E. 623; Wyke v. Rogers, 1 D. M. & G. 408; Bramwell v. Eglinton, 5 B. & S. 39; Dorrance v. Jones, 27 Ala. 630; McCoy v. Hazlett, 14 Kas. 430; Schilling v. Durst, 42 Pa. 126; Costelo v. Cave, 2 Hill (S. Ca.), 528; Kelsey v. Rosborough, 2 Rich. 241; Paine v. Voorhees, 26 Wis. 522, it did not sufficiently appear that the bill or note was given and received otherwise than as collateral security.

Conf. Cornell v. Lamb, 20 Johns. 407. — Ed.

in the name of the mortgagor or his heir (without his consent or privity), tender the money, and the mortgagee accepteth it, this is a good satisfaction." See also the case of 36 Hen. VI., reported in Fitzherbert's Abridgment, title Barre, pl. 166: "If a stranger does trespass to me, and one of his relations, or any other, give any thing to me for the same trespass, to which I agree, the stranger shall have advantage of that to bar me; for, if *I* be satisfied, it is not reason that I be again satisfied. *Quod tota curia concessit.*"

In the late case of Jones *v.* Broadhurst, in this court, the question of satisfaction by a stranger was argued and considered, but not decided, not being necessary to the determination of the case; but it is observed by the court, in giving judgment, that the decision in the 36 Hen. VI., reported in Fitzherbert, is consistent with reason and justice.

It appears to us, therefore, that the bill given by William Bush, on account of the causes of action of the plaintiff against the defendant, must be taken to be a conditional payment on behalf of the defendant; that, the condition to defeat it not having happened, it operates as an absolute payment; that it might be adopted, and has been adopted by the defendant, who relies on it in his plea; and, consequently, that it bars the action. *Judgment for the defendant.*[1]

[1] "Much discussion has taken place in numerous cases in modern times as to the effect of giving a bill or note 'for and on account' of a debt, as contradistinguished from 'in satisfaction and discharge,' during the currency of the instrument. For a long time, and down to the case of Ford *v.* Beech, 11 Q. B. 852, it was taken for granted that the taking a bill or note 'for and on account of' the debt operated as an exception to the general rule of law that a suspension of the remedy for ever discharged the debt. But the late Mr. Justice Maule, in a very elaborate judgment, pronounced by him in a case of Belshaw *v.* Bush, expresses a strong opinion that the decision of the Exchequer Chamber in Ford *v.* Beech, though right in substance, was wrong as to the principle upon which it proceeded. That very learned judge denies that the doctrine in question was any exception to the rule at all; and so far he dissents from the principle upon which the cases had been supposed to be based. That, however, leaves the main question precisely where it was. I must confess I have always entertained some doubt as to the principle enunciated by the earlier part of the judgment in Belshaw *v.* Bush; but I have no doubt or difficulty whatever in adopting the latter part, where the learned judge lays down the true doctrine upon which this branch of the law is founded, viz. that, in the case of a money demand, if the creditor accepts a bill or note for and on account of the debt, that operates as a conditional payment." *Per* Williams, J., in Bottomley *v.* Nuttall, 5 C. B. N. S. 143, 144 --Ed.

CROWE v. CLAY.

In the Exchequer Chamber, February 1, 1854.

[*Reported in* 9 *Exchequer Reports*, 604.]

Error on the judgment of the Court of Exchequer, in the case of Clay v. Crowe.[1]

[1] 8 Exch. 295. [The pleadings were as follows: "The declaration stated that the plaintiff sues the defendant for money payable by the defendant to the plaintiff for goods, bargained, sold, and delivered by the plaintiff to the defendant; and for that the plaintiff, on the first day of April, in the year 1852, by his bill of exchange now overdue, directed to the defendant, required the defendant to pay to the plaintiff's order £28 3*s*., two months after date; and the defendant accepted the said bill, but did not pay the same.

"The defendant pleaded, secondly: 'As to £42 5*s*. 2*d*., parcel, &c., the defendant says that, before action, the plaintiff, by his bill of exchange directed to the defendant, required the defendant to pay to the plaintiff's order £42 5*s*. 2*d*. five months after date; and the defendant accepted and delivered to the plaintiff, who took and received such bill for and on account of the said sum of £42 5*s*. 2*d*., parcel, &c.; and the plaintiff afterwards lost such bill out of his possession, and from thence hitherto the same has remained so lost, and the plaintiff has been unable to produce it, and ceased to have any power or control over it; and the defendant has never since such loss found such bill, nor known where it was to be found, nor had any power or control over it.'

"General demurrer and joinder."

The following opinion of the Court of Exchequer was delivered by

"Parke, B. We are of opinion that the plea in this case is bad in substance.

"The law upon the subject of lost bills may be considered, as settled by the decided cases, to be this: If a negotiable bill or note, that is, a bill payable in its original state to bearer or order, be lost at the time a party to it is called on to pay, the loss constitutes a good defence; otherwise, if it be not in its original state a negotiable bill or note, as where it is payable to the payee only.

"The former of these propositions is supported by the well-considered judgment of the Court of King's Bench, in the case of Hansard *v*. Robinson, which does not confine the necessity for the production of the bill or note by the plaintiff to the cases where it was payable to bearer originally, or became so by indorsement in blank (as, indeed, the bill in that case did); but Lord Tenterden, in giving the judgment of the court, lays down the position generally, that the law-merchant requires the production of the instrument before a party to it can be called on to pay it. And this case was followed in Ramuz *v*. Crowe. The case of Wain *v*. Bailey, 10 A. & E. 616, however, decides that this doctrine applies only to negotiable bills. The loss of a note or bill payable to the payee only is no answer to an action by him.

"The bill given in the present case was a negotiable bill; and therefore its loss at maturity or afterwards, when the plaintiff should sue on it, would have been an answer to an action at his suit on the bill, and probably to this action on the consideration for which the bill was given.

Dowdeswell argued for the plaintiff in error (the defendant below), in last Trinity vacation[1] (June 17). The plea affords a good defence to the action. The judgment of the Court of Exchequer proceeded on the ground that the plea did not show that the bill had arrived at maturity; and, assuming that it was still running, its loss was no answer to the plaintiff's claim. But irrespective of the allegation of the loss of the bill, the plea discloses a sufficient *prima facie* defence; for it states that the bill was given "for and on account of" the debt. According to the authority of Kearslake *v.* Morgan, which had been followed by Belshaw *v.* Bush and Ford *v.* Beech,[2] a negotiable bill or note given "for and on account" of a simple contract debt, suspends the remedy for its recovery until the security has become due. Conceding, therefore, that the Court of Exchequer was right in assuming that the bill was still running, there is enough on the face of this plea to bar the action. If, however, it is to be taken that the bill had arrived at maturity, then, according to the judgment of that court, its loss is a good answer.

Atherton, for the defendant in error (the plaintiff below). If the defendant below intends to rely solely on the fact that a negotiable bill was given for and on account of the debt sought to be recovered, the plea should have contained an averment either that the bill was indorsed to a third person, or that it had not arrived at maturity at the time of action brought. Price *v.* Price. However, that ground of defence (which was not adverted to in the court below) is not now available, because it is consistent with every allegation in the plea that the bill had arrived at maturity. Therefore, if the statement as to the loss of the bill be struck out of the plea, it will afford no answer whatever to the action. Then what is the effect of the plea, if considered as setting up the defence of a lost bill? Assuming, as the plaintiff is entitled to do upon these pleadings, that at the time of the loss the bill had not arrived at maturity, and was unindorsed, no stranger could enforce payment of it. In Hansard *v.* Robinson, the bill was indorsed in blank, and was overdue at the time of its loss; and the judgment in that case proceeds in a great measure on the hardship of

"But the loss of a bill not yet arrived at maturity is immaterial. The bill may be found before it is due, and then the previous loss is not of the least consequence.

"The plea must be taken most strongly against the defendant; and if we assume the bill to be still running, which we ought to do, the loss of it in no way affects the plaintiff's case.

"For this reason, we are of opinion that our judgment should be for the plaintiff. "*Judgment for the plaintiff.*"] — ED.

[1] Before Coleridge, Maule, Cresswell, Wightman, Williams, Talfourd, and Crompton, JJ.

[2] 11 Q. B. 873.

casting on the acceptor the burden of proving the loss, and that the holder obtained the bill after it became due. That does not apply here. To bring the case within the principle of that decision, the plea should have contained an averment that the bill was indorsed. Wain v. Bailey [1] is an express authority that the maker of a note not negotiable cannot refuse to pay the amount when due, on the ground that the payee has not got it in his possession or power, and cannot produce it for the purpose of delivering it up to the maker on payment. And in Rolt v. Watson [2] it was held no answer to an action for goods sold that the defendant had accepted a bill for the amount which the plaintiff lost, he never having indorsed it. In this case, it must be presumed that the bill was unindorsed, there being no allegation to the contrary. Price v. Price shows that the fact of indorsement ought to come from the defendant.

Dowdeswell, in reply. In either view, the plea is a good *prima facie* answer to the action. [WIGHTMAN, J. It is consistent with every allegation in it that the bill was unindorsed. Then, according to Ramuz v. Crowe, a person who has lost a negotiable bill cannot, by the law-merchant, compel payment of it, even though it is unindorsed.] A remedy is provided by the 9 & 10 Wm. III. c. 17, § 3, under which, upon a satisfactory indemnity being tendered, payment may be enforced in a court of equity. *Ex parte* Greenway; [3] Byles on Bills, p. 302, 6th ed. Alexander v. Strong [4] also shows that an acceptor has a right to have the bill delivered up on payment. As a general principle of law, a person intrusted with an instrument is bound to take due care of it. Davidson v. Cooper,[5] Pigot's Case.[6] And it would be unreasonable to hold that an innocent party should bear the loss arising from the negligence of another. In Woodford v. Whitely,[7] Parke, J., ruled that a debt for which a bill has been given and lost could not be recovered. Champion v. Terry [8] is also an authority that a defence of this kind is available either in an action on the bill or on the original consideration. Rolt v. Watson is at variance with Champion v. Terry, and must be considered as overruled by Hansard v Robinson.

Cur. adv. vult.

The judgment of the court was now delivered by

COLERIDGE, J. In this case, the declaration is for goods sold and delivered, and for money due to the plaintiff on a bill of exchange drawn by him on and accepted by the defendant. The plea, as to the

[1] 10 A. & E. 616.
[2] 4 Bing. 273.
[3] 6 Ves. 812.
[4] 9 M. & W. 738.
[5] 13 M. & W. 343.
[6] 11 Rep. 27.
[7] Moo. & M. 517.
[8] 3 Bro. & B. 295.

sum of £42 5s. 2d., part of the demand, is that before action the plaintiff drew on the defendant a bill of exchange for the amount, payable to the plaintiff's order five months after date, which the defendant accepted and delivered to the plaintiff for and on account of the said sum, and the plaintiff afterwards lost the bill out of his possession, and from thence hitherto the same has remained so lost, and the plaintiff has been unable to produce it, and ceased to have any power or control over it, and the defendant has never since such loss found such bill, nor known where it was to be found, nor had any power or control over it. To this plea there was a general demurrer, on which the Court of Exchequer gave judgment for the plaintiff.

It is well established that, in an action on a negotiable bill of exchange, the plaintiff must be the holder at the time he sues upon it, and, if he has lost it, cannot maintain an action upon it. In the case of Hansard v. Robinson, the Court of Queen's Bench, in giving judgment, points out the inconvenience and injustice which would arise if the plaintiff in such a case could recover, and throw on the defendant the consequences of the plaintiff's negligence, and shows that the proper remedy of the loser of the bill is in equity, where he might call on the party liable on the bill, on due indemnity, to give him another bill or pay him the amount. In the case of Ramuz v. Crowe, this law was extended to the case of a bill payable to the drawer's order, though not indorsed at the time of the loss, as the bill had been in the case of Hansard v. Robinson; and this case seems well decided, the right to have the bill on payment, and the possible inconvenience and embarrassment of the defendant in being called on to pay the lost bill, being of the same kind in the two cases.

The present case is not one of an action on the lost bill, but on the demand on account of which the bill was given. A bill given "for and on account" of money due on simple contract operates as a conditional payment, which may be defeated at the option of the creditor, if the bill is unpaid at maturity in his hands; in which case he may rescind the transaction of payment, and sue on the original demand. Griffiths v. Owen,[1] James v. Williams.[2] If the bill be lost, the condition on which the payment may be defeated does not arise. Belshaw v. Bush. And the defendant, if compelled to pay the original debt, would be subject to inconvenience of the like kind as if compelled to pay the bill. Accordingly, it was held at Nisi Prius in Woodford v. Whiteley that a debt paid by a lost bill could not be recovered, and the like law was assumed in the cases of Mercer v. Cheese[3] and Price v. Price. It appears, therefore, that the loss of a negotiable bill given

[1] 13 M. & W. 58, 64. [2] 13 M. & W. 828. [3] 4 M. & G. 804.

on account of a debt is an answer to an action for the debt, as well as to one on the bill.

It was objected to the plea in the present case that it did not show that the bill was overdue, and that the loss of a bill not due was immaterial; but the loss here is shown to be subsisting at the time the action is brought. To entitle the plaintiff to sue, he ought to be the holder of the bill, and the bill ought to be due; and there seems no reason why the defendant may not rely on a defect of the plaintiff's title in either of these respects, leaving the other unnoticed. It may well be that a person who has given a bill on account of a debt may be able and willing to pay the debt if he can withdraw his bill from circulation, and may object to pay only on the ground that the bill is not forthcoming, without objecting to its not being due. The present plea is therefore a sufficient bar to the action. It discloses a state of facts inconsistent with the plaintiff's right of action: it therefore shows a defence in substance, and is consequently good on general demurrer. The judgment of the Court of Exchequer must therefore be reversed.

Judgment reversed.[1]

[1] Dangerfield *v.* Wilby, 4 Esp. 159; Champion *v.* Terry, 3 B. & B. 295; Woodford *v.* Whiteley, M. & M. 517; Widders *v.* Gorton, 1 C. B. N. S. 576 (*semble*), *accord.*

Rolt *v.* Watson, 4 Bing. 278 (*overruled*); Hadwen *v.* Mendizabel, 10 Moore, 477 (*overruled*), *contra.*

It is held that a creditor need not tender the bill or note to his debtor before bringing his action upon the original claim: Clark *v.* Young, 1 Cranch, 191; Thurston *v.* Blanchard, 22 Pick. 18 (*semble*); Nichols *v.* Michael, 28 N. Y. 264; Leger *v.* Bonaffe, 2 Barb. 475; Whitaker *v.* Whitaker, 4 Hun, 810; the production of the instrument at the hearing or trial being considered sufficient: Ramsay *v.* Allegre, 12 Wheat. 611; Raymond *v.* Stewart, 5 McL. 269; The Eclipse, 3 Biss. 99; The Napoleon, 7 Biss. 393.

The doctrine of the principal case, however, does not prevail generally in this country; the creditor being thought entitled to recover on his original claim, if he either produces the negotiable security at the trial or hearing, or proves its loss or destruction. Davidson *v.* Bridgeport, 8 Conn. 472; Bill *v.* Porter, 9 Conn. 23; Rayburn *v.* Day, 27 Ill. 46; Kermeyer *v.* Newby, 14 Kas. 164; Morgan *v.* Bitzenberger, 8 Gill, 350; Glenn *v.* Smith, 2 Gill & J. 493; Morrison *v.* Welty, 18 Md. 169; Matthews *v.* Dare, 20 Md. 248; Alcock *v.* Hopkins, 6 Cush. 484; Young *v.* Hibbs, 5 Neb. 433; Vanauken *v.* Hornbeck, 2 Green, 178; Holmes *v.* Du Camp, 1 Johns. 34; Angel *v.* Felton, 8 Johns. 149; Burdick *v.* Green, 15 Johns. 247; Nichols *v.* Michael, 28 N.Y. 264; Woodin *v.* Frazee, 38 N. Y. Sup'r Ct. 190; Spear *v.* Atkinson, 1 Ired. 262; Hays *v.* McClurg, 4 Watts, 452; Lazell *v.* Lazell, 12 Vt. 448. A voluntary destruction of the security by the holder, however, bars the original cause of action. Vanauken *v.* Hornbeck, 2 Green, 178. — Ed.

PEACOCK AND ANOTHER v. PURSELL.

IN THE COMMON PLEAS, JUNE 8, 1863.

[*Reported in* 14 *Common Bench Reports, New Series*, 728.]

THE first count of the declaration was upon a bill of exchange for £30, payable two months after date, and drawn by one Perry upon and accepted by one Angerstein, and indorsed by Perry to the defendant, and by the defendant to the plaintiff. The second count was for goods sold and delivered.

The pleas to the first count traversed the indorsement, the presentment, and the notice of dishonor of the bill; and, to the second count, the defendant pleaded, as to £30, parcel, &c., that the plaintiffs accepted and received the bill for and on account of the debt therein mentioned. Issue thereon.

The cause was tried before Byles, J., at the sittings in London after last Hilary term. It appeared that, in March, 1862, the defendant, being indebted to the plaintiffs in a larger sum for goods sold and delivered, sent them the bill in the first count mentioned as part payment and the balance in cash. The plaintiffs, however, declined to receive the bill, when the defendant said that, if they would not accept it as part payment, there could be no objection to their retaining it as collateral security. The plaintiffs accordingly kept the bill; and when it became due they neglected to present it, or to give notice of dishonor.

On the part of the defendant, it was submitted that the plaintiffs had by their laches deprived themselves of all remedy against the plaintiff.

For the plaintiffs, it was insisted that, though they might have lost their remedy upon the bill, they might still go for the consideration.

The learned judge nonsuited the plaintiffs, reserving them leave to move.

H. James, in Easter term last, obtained a rule *nisi* to enter a verdict for the plaintiffs on the money counts, "on the ground that the non-presentment and not giving notice of dishonor of the bill, under the circumstances under which it was delivered, did not satisfy or answer the plaintiffs' claim."

Pulling showed cause. The plaintiffs, having by their own act made the security unavailable, cannot now turn round and say that they did not receive it for and on account of the debt. In Crowe *v.* Clay, a lost bill was held to be satisfaction. Whether the bill was

originally received for and on account of the debt, or as a collateral security, is quite immaterial: by the plaintiffs' laches, it ceased to be a security, and became payment.

H. James, in support of the rule. The question is, whether the allegation in the plea, that the bill in question was received "for and on account" of the debt, was sustained by the evidence. Conceding that there was no presentment and consequently no notice of dishonor, that is no answer to the plaintiffs' claim for the goods sold and delivered, inasmuch as they received it merely to hold as collateral security.

ERLE, C. J. I am of opinion that this rule must be discharged. The action is for goods sold and delivered. The plea is, that the defendant delivered and the plaintiffs accepted and received a bill of exchange for and on account of the debt. The evidence is, that the defendant, being indebted to the plaintiffs for goods sold and delivered, offered them the bill in question, which the plaintiffs at first declined to receive, but, being pressed to take it as collateral security, consented to do so. Assuming that the meaning of a bill being received "for and on account of" a debt would operate as a suspension of the remedy for the debt during the currency of the bill, the evidence here would not support the plea, if it were necessary to go to that extent. But, however the bill was received, it clearly would be payment, if at maturity the money were obtained for the bill. Now, this case has eventuated in the non-payment of the bill, coupled with this fact, that the holders having neglected to present the bill, and to give the defendant notice of its dishonor, all remedy upon it is lost. The security is marred by the plaintiffs' own laches. The legal effect of taking a bill as a collateral security is that, if, when the bill arrives at maturity, the holder is guilty of laches, and omits duly to present it and to give notice of its dishonor, if not paid, the bill becomes money in his hands as between him and the person from whom he received it. That being so, the plaintiffs' debt is satisfied.

WILLIAMS, J. I am of the same opinion. The laches of the plaintiffs in not duly presenting the bill constituted this a payment before action brought.

WILLES, J. I am of the same opinion. When a bill is given for and on account of a debt, it usually operates as a suspension of the remedy until the maturity of the bill. But if the creditor, when the bills fall due, is guilty of laches whereby the security becomes deteriorated or valueless, it becomes equivalent to actual payment That state of things may be altered by agreement. The bill may be accepted in satisfaction, but that is unusual; or it may be taken for and on account, but with an understanding that the party receiving it

is to have the option of suing for the debt before the maturity of the bill. Whether that would support such a plea as this, it is unnecessary to say. By their laches, the plaintiffs have converted this into a money payment.

BYLES, J. I am of the same opinion. Assuming that, notwithstanding their having taken the bill, the plaintiffs were still at liberty to sue for the debt, it is quite clear that, as depositees of the bill, as they had the rights, so they had the duties of holders. No one else could present the bill; and, as they failed in that duty, they discharged the defendant. If the defence had been properly pleaded, the matter would have been free from doubt; and there was leave reserved to amend, if necessary. *Rule discharged.*[1]

SMITH AND OTHERS v. MERCER AND OTHERS.

IN THE EXCHEQUER, NOVEMBER 20, 1867.

[*Reported in Law Reports, 3 Exchequer,* 51.]

SPECIAL CASE.

The plaintiffs are merchants at Liverpool, and the defendants cotton spinners at Clitheroe. On the 9th of February, 1866, the plaintiffs sold, through Messrs. Curry & Co., cotton brokers, fifty bales of cotton to the defendants. The mode of payment prescribed by the invoice sent with the goods was "payment within ten days, by cash or by approved bankers' bills, not exceeding three months' date, to be made equal to cash in ten days and three months from the day of sale." A few days after the sale, the defendants remitted to Curry & Co. sufficient cash to pay for the goods. On receiving it, Curry & Co. paid it in to Barned's Banking Company, and on the 20th of February obtained a bill of exchange, payable eighty-eight days after date, for the invoice price of the cotton (£1,222 2*s.*), drawn by Barned's Banking Company on Messrs. Prescott, Grote, Cave, & Co., of London. This bill, to which the defendants were not parties, was indorsed by Curry & Co. to the plaintiffs, and was delivered to them on the same day on which it was received from the bank. The plaintiffs thereupon gave a receipt "for the sum of £1,222 2*s.*, being payment of fifty bales cotton sold 9th inst."

On the 24th of February, the plaintiffs indorsed the bill to certain

[1] Lawrence *v.* McCalmont, 2 How. 426; Hamilton *v.* Cunningham, 2 Brock. 350 (*semble*); Lee *v.* Baldwin, 10 Ga. 208; Haines *v.* Pearce, 41 Md. 221; Roberts *v.* Thompson, 14 Oh. St. 1, *accord.* — ED.

persons, who took it for value in the ordinary course of business. Barned's Banking Co. failed on the 19th of April following; and on the 23d the holders of the bill presented it for acceptance to Messrs. Prescott, Grote, Cave, & Co., who declined to accept it. It was admitted that, had the bill been presented before the failure of Barned's Banking Company, it would have been duly accepted.

Due notice of dishonor was given by the holders to the plaintiffs, and by them to Curry & Co. and Barned's Banking Co. The bill not having been taken up, the plaintiffs, by a letter dated the 9th of May, communicated the fact to the defendants, and applied for payment of the cotton. This letter was the first intimation received by the defendants that the plaintiffs had not been paid in cash by Curry & Co. for the cotton. The bill which was substituted for cash was sent to the plaintiffs without their knowledge or sanction, but of this the plaintiffs were not aware. Barned's Banking Company were bankers in good credit when the plaintiffs took the bill, and the bill was an "approved" banker's bill.

The question for the opinion of the court, which is to have power to draw inferences of fact, is whether the plaintiffs are entitled to recover from the defendants the price of the cotton.

Crompton Hutton, for the plaintiffs. The bill is found to have been an "approved banker's bill," and therefore one which the plaintiffs were bound to take according to the terms of the contract. But they did not, by so doing, discharge the defendants. They had a right to look for cash, or what could be turned into cash. It turned out that the "approved bill" was worthless, and therefore they are entitled to have recourse to the defendants. But then it will be said there was laches, first in not presenting the bill for acceptance earlier, and secondly in not giving the defendants notice of dishonor. As to the first point, the bill was payable not at sight, but at a certain period after date; and there was no laches in not presenting it before it became due. As to the second, the defendants were not parties to the bill, and not entitled to notice at all. The day after the dishonor of the bill, an action for goods sold and delivered might have been commenced against them.

[The court referred to Camidge v. Allenby.]

That case, like Strong v. Hart,[1] is distinguishable on the ground that there the plaintiff voluntarily took the bill. Here the plaintiffs had no choice.

Quain, Q.C. (*Baylis* with him), contra. The bill was payment, and in the receipt it is stated to have been so received.

[The court intimated that the terms of the receipt could not be relied on.]

[1] 6 B. & C. 160.

It was to be an approved banker's bill, *i. e.* a bill which the vendors might or might not approve. They did approve this bill, and thereby exercised an option.

[PIGOTT, B. In Smith's Mercantile Law, 7th ed. p. 507, an "approved" bill is said to be a bill to which no reasonable objection can be taken.]

The plaintiffs were at all events not bound to take any bill. They might have objected to this one, if they had thought fit.

[BRAMWELL, B. It appears to me that the plaintiffs might, before taking this bill, have insisted on the defendants' indorsing it. They did not take that precaution; but, that being so, can they be held to have taken the bill in discharge of the price of the cotton?]

Assuming that they cannot, and that recourse might still be had to the defendants, the plaintiffs by their laches lost the power to recur to them. They were bound to give notice of dishonor to the defendants, who were liable, if at all, only in the same manner as if they had indorsed the bill. [He was stopped.]

C. Hutton, in reply.

KELLY, C. B. The plaintiffs in this case were the vendors of certain cotton to the defendants, and were to be paid for it, according to the contract, "within ten days, by cash or by approved bankers' bills, not exceeding three months' date, to be made equal to cash in ten days and three months from the day of sale." The defendants remitted cash to their brokers, who, however, did not remit it to the vendors, but instead paid them by a banker's bill drawn by Barned's Banking Company on Messrs. Prescott, Grote, Cave, & Co., of London. The circumstance of a bill being given instead of cash is not material. The brokers were the defendants' agents, and the defendants were bound by their act. Then the bill having been received by the plaintiffs, the question arises whether it was an "approved" bill or not. The case finds that it was, and by that finding we must understand that it was a banker's bill to which no reasonable mercantile objection could be made. On receipt of the bill, the plaintiffs did not immediately present it for acceptance to the London bankers to whom it was addressed, but indorsed and circulated it. It might be contended, I think, that by this conduct the plaintiffs made it their own. The fact of the holder being able to present it to the London bank was an element which went to make it an "approved bill;" and it may well be that the plaintiffs having accepted it, and then having failed to present it, made it their own, and upon its becoming valueless were precluded from having recourse to the defendants. It is, however, unnecessary to decide this point on the present occasion.

The next fact to be noticed is the failure of Barned's Bank, which took place some two months after the plaintiffs had received the bill. Then at length the plaintiffs take, or cause to be taken, measures for the presentment of the bill for acceptance. It was presented, but was dishonored. Upon this, the holders of the bill were bound to give notice of dishonor to all parties to it, and this appears to have been done. But in this action they are seeking a remedy against the defendants, who were not parties to it, and who had had no notice of dishonor. This directly raises the question whether under such circumstances recourse can be had to the defendants. I am of opinion that it cannot; and although it may be that the plaintiffs had no option but to take the bill in the first instance, it being an "approved" bill and according to the terms of the contract, I think their right to proceed against the defendants was conditional on their giving the defendants notice of the dishonor of the bill. Both on principle and authority, if the plaintiffs meant to have recourse to the defendants, they should have given them notice, upon finding the bill was dishonored. Our judgment, therefore, must be for the defendants.

BRAMWELL, B. I am of the same opinion. Looking at the words of the contract only, there has been no default on the part of the defendants. They have done as they were entitled to do under the contract: they have paid by an "approved" bill. But then the plaintiffs in effect say that mercantile understanding often attaches obligations to parties which are not expressed in words. In this case, I think there was such an obligation to this extent: that the plaintiffs might, if they had chosen, have insisted on the defendants indorsing the bill. They did not so insist, but in my judgment the defendants' liability continues just as though they had. They are liable in the same manner, and with the same incidents as if they had been called on, as they might have been, to indorse the bill. But they are not liable otherwise, and therefore not liable without a notice of dishonor being given to them. The plaintiffs failed to give that notice, and therefore are not entitled to recover. In short, they seem to me in this dilemma: either they took the bill out and out, for better, for worse, in which case the defendants are not liable at all, or else they took it with power of having recourse to the defendants, but only as if the defendants had indorsed it, and in that case the defendants, being without notice of dishonor, could not be made liable. My judgment, on principle, is accordingly for the defendants, and the authorities are to the same effect.

PIGOTT, B. I am of the same opinion on the same grounds. Either the defendants paid for the goods out and out by the bill, or else remained liable, as though they were actual parties to it. In the

former case, they were never liable at all; in the latter, they have ceased to be liable because they received no notice of the dishonor of the bill.[1] *Judgment for the defendants.*[2]

COHEN v. HALE.

THE MIDLAND RAILWAY COMPANY, GARNISHEES.

IN THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, MAY 23, 1878.

[*Reported in* 8 *Queen's Bench Division*, 371.]

MOTION to set aside an order of the district registrar of Dudley. The facts were as follows:—

The plaintiff recovered judgment in the action on the 9th of November, 1877, for £35 12*s*. On the 24th of December, the Midland Railway Company, being indebted to the defendant in the sum of £44 8*s*. 9*d*., drew a check for that amount on the Wolverhampton Branch of Lloyd's Banking Company, and sent it to the defendant, who received it a day or two afterwards. On the 27th of December, the plaintiff applied for and obtained a garnishee order under Order XLV., Rule 2, attaching the debt due from the Midland Railway Company to the defendant. This order was served on the Midland Railway Company on the 30th of December; and they thereupon stopped payment of the check, which still remained in the hands of the defendant unpresented. The defendant retained the check till the 11th of February,

[1] In the case of *In re* Br. & Am. Steam Nav. Co., L. R. 8 Eq. 506, the plaintiff, in payment of work performed by him for A and B, received the acceptance of A. The bill was dishonored, but no notice given to B, who was not a party to the bill. The court held that B was, nevertheless, still liable to the plaintiff. Sir John Stuart, V. C., delivered the following opinion: "The contract is by both parties to pay the money, and therefore till payment the contract was not fulfilled. There are particular provisions as to the mode of payment; but until the payment the obligation remains. The case of Smith v. Mercer is a clear authority in favor of the claim. Mr. Baron Bramwell says that the plaintiffs in that case might have insisted on the defendants indorsing the bills; but he goes on to say that the liability continued just as much as if they had done so. I cannot follow the reasoning of the learned judges in their decision, but the case is a clear authority to show that taking a bill is not payment till the bill is satisfied, and that non-indorsement by the other debtor does not deprive the creditor of his remedy. The claim must be admitted to proof." —ED.

[2] The case of Swinyard v. Bowes, 5 M. & S. 62 [*supra*, p. 586, s. c.], was not cited during the argument. It may, however, be remarked that in that case there was no preappointed mode of payment. See also Van Wart v. Woolley, 8 B. & C. 439.

and then took it to the Dudley Branch of Lloyd's Banking Company, and got them to give him cash for it, that branch not being the one on which the check was drawn, and knowing nothing of the stoppage of the check. The Midland Railway Company suggested that Lloyd's Banking Company had a lien or charge on the debt, and Lloyd's Banking Company ultimately appeared on the garnishee proceedings, and claimed to have such lien or charge; but the district registrar made an order barring any lien or charge on the debt attached as between them and the garnishees, but not as between them and the judgment debtor, and directing that the judgment creditor should recover the sum of £35 12*s*., and that execution should issue against the garnishees for that amount.

R. C. E. Plumptre moved, on behalf both of the garnishees and Lloyd's Banking Company, to rescind the above-mentioned order. There cannot be an attachment of any thing but an absolute debt. When the check was given, there was no longer an absolute debt. Payment of a debt by check is a conditional payment, and operates as a payment until the check is dishonored. Chitty on Bills, 11th ed. p. 356. A creditor who takes a check takes what is equivalent to a cash payment, if the check is ultimately paid. If the check is dishonored, the debt revives. At the time the garnishee order in the present case was served, there was no absolute debt; for the check was then in the hands of the judgment debtor unpresented. If the debt could be attached under these circumstances, it would follow that the execution creditor could call on any garnishee who had given a check to go and stop it immediately, and hold him responsible, if he did not.

[COCKBURN, C. J. It may be that the garnishees could have refused to stop the check, but they did stop it: under these circumstances, is not the payment gone *ab initio?*]

The garnishee order must be good or bad when made; and, when it was made, there had been a conditional payment of the debt, and it was uncertain whether the debt ever would revive. Hall *v.* Pritchett.[1]

The garnishees had no right to stop the check. The stopping of the check was wrongful as against the execution debtor.

[COCKBURN, C. J. The only effect of it would be to remit him to his original right on the consideration for the check.]

[He also cited Keene *v.* Beard.]

E. Clarke, for the judgment creditor, was not called upon to show cause.

COCKBURN, C. J. This is a clear case. It appears to me that the reasoning of the counsel for the garnishees involves a fallacy. It

[1] 3 Q. B. D. 215.

treats the debt as extinguished when the garnishee order was served It is contended that there must be a subsisting debt on which the order can operate when it is served. But, granting this, the reasoning fails, because it is not in my opinion shown that there was not, as the event happened, an existing debt in this case. It is very true that a man who takes a check may be estopped from proceeding to enforce payment of the debt until presentment of the check; and, if the check is ultimately paid, the debt is extinguished. All that happens in the mean time is that the right of action is suspended. But, when the check is presented and dishonored, the debt, the remedy for which was suspended until presentment of the check, may be treated as a debt subsisting all along, just as if the check had never been given. The giving of the check only suspends the remedy, it does not extinguish the debt. Therefore, when the Midland Railway Company stopped this check, it was, in my opinion, as if it had never been given. It may be that the garnishee order could not have been made effectual against them, if they had declined to stop the check, on the ground that, having given it, they had so far pledged themselves that it would not be proper for them to stop payment of it; but they did not take this course, and by their direction the check was stopped. The suspension of the remedy then ceased, and the debt remained just as if the check had never been given. Under these circumstances, I think the garnishee order could be enforced against the Midland Railway Company.

MELLOR, J. I am of the same opinion. The fallacy of the garnishees' contention in my opinion is that it does not sufficiently distinguish between the mere suspension of the remedy and the extinguishment of the debt. Till the check is presented, the remedy is in suspense; but the debt itself is not affected. The debt has never been paid, and remains in the event, I think, the proper subject of a garnishee order, though the remedy was suspended till a date subsequent to the service of the order. *Order refused.*[1]

[1] In Puckford v. Maxwell, 6 T. R. 52, a plaintiff who had received a draft from his debtor after the latter's arrest was allowed, upon the dishonor of the draft, to arrest the debtor a second time upon the original affidavit. In Wood v. Murton, 37 L. T. Rep. 788 (Q. B. D. Dec. 1877), a mortgagee had an absolute power of sale upon default of payment of interest for seven days after notice. Default was made and notice given. On the sixth day after notice, the mortgagee took a three months' bill for the amount of interest due, which bill was dishonored. The property was thereupon sold without any further notice, and the sale was held valid, the bill having merely suspended the running of the notice till maturity.

The drawer of a check given in payment of a debt cannot be garnisheed before the check is dishonored Getchell v. Chase, 124 Mass. 366. — ED.

ISAAC VANCLEEF *v.* LEWIS THERASSON AND ANOTHER.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MARCH 10, 11, 1825.

[*Reported in* 8 *Pickering*, 12.]

ASSUMPSIT on an account annexed to the writ, to recover the price of forty firkins of lard sold and delivered by the plaintiff to the defendants, who at the time were partners in trade in the city of New York.

At the trial before Wilde, J., the plaintiff proved the sale and delivery; but it appeared that a negotiable note had been given by the defendants at the time, payable in four months, and that the plaintiff had given a receipt stating that the note was received in full for the lard. Whereupon, the plaintiff moved for liberty to amend his writ by inserting a count on the note; but this amendment was not allowed.

The plaintiff then offered evidence to prove that the note had never been paid, and that it was lost. The defendants' counsel contended that the note, being negotiable, was in law payment for the lard; but as it appeared that the contract was made in New York, and was to have been performed there, and as it was admitted that by the law of New York, as laid down in reported cases, the note would not amount to payment, the jury were instructed to find for the plaintiff, if they should be satisfied that the note had never been paid, and that it was actually lost, and they accordingly found a verdict for the plaintiff.

If the court should be of opinion that on this evidence the plaintiff was not entitled to recover, the verdict was to be set aside, and the plaintiff was to become nonsuit, unless the court should be of opinion that the motion to amend ought to have been allowed.

Morse, for the defendants, insisted that the giving of the note was a payment, Thacher *v.* Dinsmore;[1] and that the plaintiffs having given a receipt stating that the note was received in full for the lard was an agreement that the note should be considered as payment, which even according to the law of New York would be a discharge of the previous simple contract debt.

J. C. Merrill, contra, cited on this point Porter *v.* Talcott,[2] Holmes *et al. v.* D'Camp,[3] Thompson *v.* Ketcham,[4] Pintard *v.* Tackington,[5] Burdick *v.* Green,[6] Tobey *v.* Barber;[7] and he contended that the writ was

[1] 5 Mass. 302. [2] 1 Cowen, 359. [3] 1 Johns. 34.
[4] 8 Johns 149. [5] 10 Johns. 104. [6] 15 Johns. 247.
[7] 5 Johns 68.

amendable, for the note and the account were for the same cause of action, at least by the law of New York, and the amendment would not have prejudiced any third party. Willis *v.* Crooker,[1] Haynes *et ux.* *v.* Morgan.[2]

PARKER, C. J., gave the opinion of the court in substance as follows: It is very clear that, by the decisions of this court, a few years since, in the cases of Little *v.* Little, in Essex, and Tappan *v.* ———, in Hampshire, not reported, the amendment could not be allowed; for the note and the account were substantially different causes of action. What may be the law of New York on this point it is unnecessary to determine; for we are clear that the action may be sustained without the amendment. The contract having been made in New York with reference to their laws, it is to have the same effect here which it would have there; and it is manifest from a series of cases in the reports of that State that the note being lost cannot be viewed as an extinguishment of the antecedent debt, unless it were so expressly agreed, and that the receipt given by the plaintiff does not amount to such an agreement. Burdick *v.* Green,[3] Tobey *v.* Barber.[4]

Judgment according to the verdict[5]

SMALL *v.* JONES.

IN THE SUPREME COURT, PENNSYLVANIA, MAY, 1839.

[*Reported in* 8 *Watts*, 262.]

ERROR to the Common Pleas of Dauphin County.

A. J. Jones and John Cameron against Peter A. Small and Samuel Small, surviving partners of Smalls & Co.

This suit was brought to recover $165, the balance of a sum of $200, alleged to have been lent by plaintiffs to the firm of Smalls & Co., composed of defendants and John Small, deceased. The business of that firm was conducted by John Small, under the name of Smalls & Co. John Small, some time before February, 1836, sent his clerk, Seibert, to plaintiffs, to borrow $200. The money was obtained. Whether John Small sent with his clerk a promissory note to plain-

[1] 1 Pick. 204.
[2] 8 Mass. 208.
[3] 15 Johns. 247.
[4] 5 Johns. 68.
[5] The Chusan, 2 Story, 458; Repport *v.* Robinson, Taney, 492; Page *v.* Hubbard, 1 Sprague, 385; Castor *v.* Townsend, 1 Cliff. 1; Baker *v.* Draper, 1 Cliff. 420; Bartsch *v.* Atwater, 1 Conn. 409; Ward *v.* Howe, 38 N. H. 35; Street *v.* Hall, 29 Vt. 165; Robinson *v.* Hurlburt, 34 Vt. 115, *accord.* — ED.

tiffs for the $200, and, if he did, whether it was signed by John Small individually, or in the name of Smalls & Co., was disputed. On the 27th of February, 1836, John Small sent his clerk with $35, and his individual promissory note for the balance, $165, to plaintiffs. Mr. Jones objected to the note, because it was not in the name of Smalls & Co.; but on the clerk's observing that it would be paid at all events, when due, he made no further objection. This note plaintiffs had discounted in the Harrisburg Savings Institution: when due, it was protested; and plaintiffs, since the commencement of this suit, have repaid that institution. It was objected that plaintiffs cannot recover, because they had the money received on discount of the note, at the commencement of this suit, and did not repay it to the Harrisburg Savings Institution till after the commencement of this suit.

The court below was of opinion that this was not a valid objection to the plaintiffs' recovery, and so instructed the jury. Verdict for plaintiffs.

Alricks and *Johnston*, for plaintiffs in error.

M'Clure, for defendants in error.

The opinion of the court was delivered by

SERGEANT, J. There is one portion of this charge in which the court below erred; and that is, in instructing the jury that there was no validity in the objection that the plaintiff could not recover, because he did not take up the note until after the commencement of this suit. If a person lend money and take a note, payable at a future day, in payment of it, and then parts with the note for a valuable consideration, he cannot sue, either on the note or on the original cause of action, till he has taken up the note.[1] If he could, the debtor might be liable to two suits, one by the holder upon the note, and the other by the creditor on the original cause of action. Where the note is outstanding in the hands of an agent of the creditor, or of one who has paid no consideration, it is sufficient to produce it at the trial, as was held in Burden v. Halton.[2] But the case is different where it has been parted with for a valuable consideration received by the creditor.

Judgment reversed.

[1] Maillard v. Duke, 6 M. & G. 40; Bunney v. Poyntz, 4 B. & Ad. 568; Harris v. Johnston, 3 Cranch, 311; Black v. Zacharie, 3 How. 483; Cocke v. Chaney, 14 Ala. 35, *accord*.

Burden v. Halton, 4 Bing. 454; Burdick v. Green, 15 Johns. 247, *contra*.

Conf. Brown v. Scott, 51 Pa. 357.

See also Tarleton v. Allhusen, 2 A. & E. 32; Kean v. Dufresne, 8 S. & R. 233; Oliphant v. Church, 19 Pa. 318; Dickinson v. King, 28 Vt. 378, in which cases a creditor who had taken up the bill or note before action brought recovered judgment on the original consideration. — ED.

[2] 4 Bing. 454.

THOMAS v. TODD.

IN THE SUPREME COURT, NEW YORK, JANUARY, 1844.

[*Reported in* 6 *Hill*, 340.]

ERROR to the Oneida Common Pleas. Thomas sued Todd before a justice, and declared for rent due from the defendant. The defence was payment of a part and tender of the residue. On the 5th of May, 1842, the defendant paid the plaintiff $23 towards the rent in bank-bills, and took a receipt. The whole controversy arose out of the fact that one of the bills, which was for five dollars, turned out to be counterfeit. Both parties, as may be inferred from the case, lived in Utica. On the same day that the bill was received by the plaintiff, he sent it to one Gates, in the adjoining town of Frankfort, who in a short time sent it back to the plaintiff as counterfeit. On the 4th of July, the plaintiff asked the defendant to take back the bill; but the defendant said the plaintiff did not have it of him. The plaintiff said he did, and that he at the same time gave it to a boy to take to Frankfort; that in a short time it was brought back, and said to be counterfeit; that the plaintiff took it again, and gave it to a man in Westmoreland; and that it then came back again. The justice gave judgment for the plaintiff for a sum which included the counterfeit bill. On certiorari, the Common Pleas reversed the judgment, on the ground that the plaintiff did not return nor offer to return the bill, nor notify the defendant that it was counterfeit, within a reasonable time. The plaintiff brought error.

Gavrin & Coburn, for the plaintiff in error.

W. Allen, for the defendant in error.

BY THE COURT, BRONSON, J. This is a case of mistake by both parties, — the one paying and the other receiving a bank-bill, supposing it to be genuine, when in truth it was counterfeit. As the bill was worthless, it did not make a good payment towards the rent, unless the plaintiff was in fault for not returning it sooner.[1] Markle v. Hat-

[1] Bell v. Buckley, 11 Ex. 631; Eagle Bank v. Smith, 5 Conn. 71; Simms v. Clark, 11 Ill. 137; Bell v. Cafferty, 21 Ind. 411 (*semble*); Allen v. Sharpe, 37 Ind. 67; Keene v. Thompson, 4 Gill & J. 468; Mudd v. Reeves, 2 Har. & J. 368; Young v Adams, 6 Mass. 182; Bride v. Batchelder, 9 All. 394; Coolidge v. Brigham, 1 Met. 547; Grafton Bank v. Hunt, 4 N. H. 492 (*semble*); Markle v. Hatfield, 2 Johns. 455; Baker v. Bonesteel, 2 Hilt. 397; Hargrave v. Dusenberry, 2 Hawks, 326; Raymond v Baar, 13 S. & R. 318 (*semble*); Ramsdale v. Horton, 8 Barr, 330; Ritter v. Sing

field,[1] Jones v. Ryde,[2] Young v. Adams.[3] And the rule is the same where, although the bill is genuine, the bank had broken before the payment was made, but the knowledge of that fact had not reached the place of payment.[4] Lightbody v. Ontario Bank.[5] And see U. S. Bank v. Bank of Georgia.[6] In all of these cases, there was an offer to return the bill immediately after discovering that it was worthless, and I think such an offer essential to the right of recovery. Pothier says the creditor may recover in such a case, on offering to return what he has received. (1 Poth. Ob. 495, Evans's ed.) This doctrine was cited with approbation in Markle v. Hatfield; and the principle is a just one. Both parties have agreed that the thing should be received in payment; and although they were acting under a mistake as to the nature or value of the thing paid, yet as the debtor has acted honestly, he can only be put in the wrong by an offer to correct the error. Although the bill has no intrinsic value, it should be returned to the debtor, so as to enable him to trace out and fall back upon the person from whom he received it. And for the same reason the bill should be returned without any unnecessary delay. That was not done in this case.[7] *Judgment affirmed.*

master, 78 Pa. 400; Ware v. Street, 2 Head, 609; Goodrich v. Tracy, 43 Vt. 314; Pindall v. N. W. Bank, 7 Leigh, 617, *accord*.

Nor altered paper. Sloman v. Cox, 1 C. M. & R. 471.

The same rule applies to negotiable paper void under stamp laws. Brown v. Watts, 1 Taunt. 353; Wilson v. Vysar, 4 Taunt. 288; Wilson v. Kennedy, 1 Esp. 245; Wade v. Beasley, 4 Esp. 7; Farr v. Price, 1 East, 55. Or to paper void under usury laws. Phillips v. Cockayne, 3 Camp. 119; Johnson v. Johnson, 11 Mass. 359; Sheppard v. Hamilton, 29 Barb. 156; Central Bank v. Dana, 32 Barb. 296; Farmers' Bank v. Joslyn, 37 N. Y. 353; Winsted Bank v. Webb, 39 N. Y. 325; Leary v. Miller, 61 N. Y. 488; Parker v. Cousins, 2 Grat. 372, 388. — Ed.

[1] 2 Johns. 455. [2] 5 Taunt. 488. [3] 6 Mass. 182.

[4] Owenson v. Morse, 7 T. R. 64; Magee v. Cormack, 18 Ill. 289; Frontier Bank v. Morse, 22 Me. 88; Small v. Franklin Co., 99 Mass. 277 (*semble*); Weddigen v. Boston Co., 100 Mass. 424 (*semble*); Fogg v. Sawyer, 9 N. H. 365; Lightbody v. Ontario Bank, 11 Wend. 9; 13 Wend. 101, s. c.; Roberts v. Fisher, 43 N. Y. 159; Westfall v. Braley, 10 Oh. St. 188; Harley v. Thornton, 2 Hill (S. Ca.), 509; Wainwright v. Webster, 11 Vt. 576; Townsend v. Racine Bank, 7 Wis. 185, *accord*.

Anon., 12 Mod. 517; Lowrey v. Murrell, 2 Port. 280; Young v. Adams, 6 Mass. 182 (*semble*); Bayard v. Shunk, 1 W. & S. 92; Scruggs v. Gass, 8 Yerg. 175; Ware v. Street, 2 Head, 609, *contra*. — Ed.

[5] 11 Wend. 9, and s. c. in error, 13 Wend. 101.

[6] 10 Wheat. 333.

[7] Simms v. Clark, 11 Ill. 137 (*semble*); Atwood v. Cornwall, 28 Mich. 336; Kenney v. First Nat. Bank, 50 Barb. 112 (*semble*); Burrill v. Watertown Bank, 51 Barb. 105 (*semble*); Raymond v. Baar, 13 S. & R. 318; Pindall v. N. W. Bank, 7 Leigh, 617, *accord*.

In Snyder v. Reno, 38 Iowa, 330; Smith v. McNair, 19 Kas. 330; Kent v. Bornstein, 12 All. 342; Brewster v. Burnett, 125 Mass. 168, it was said to be unnecessary to return absolutely worthless notes. See Small v. Franklin Co. 99 Mass. 277. — Ed.

SECTION IV.

A Bill or Note is binding without a Consideration.

POPPLEWELL v. WILSON.

IN THE KING'S BENCH, HILARY TERM, 1719.

[*Reported in* 1 *Strange*, 264.]

ERROR of a judgment in C. B. in case upon a promissory note entered into by A to pay so much to B for a debt due from C to the said B. And it was objected that this, not being for value received, was not within the statute, and *prima facie* the debt of another is no consideration to raise a promise. But the court held it to be within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value received. And the

Judgment was affirmed.[1]

SMITH v. KNOX.

AT NISI PRIUS, CORAM LORD ELDON, C. J., DECEMBER 6, 1800.

[*Reported in* 3 *Espinasse*, 46.]

ASSUMPSIT on a bill of exchange by the plaintiff as the indorsee of one Vertaul.

The bill was drawn by Vertaul, in his own favor, on the defendant, who accepted it, and indorsed by Vertaul to the plaintiff.

The plaintiff proved the handwriting of the several parties to the bill, and there rested his case.

Marshall, Serjt., for the defendant, stated that he rested his defence upon two points: 1st, that the bill in question was drawn upon the defendant by Vertaul, and accepted without any consideration; 2dly, that the plaintiff had sued Vertaul, and taken from him a warrant of attorney for the amount of the bill.

LORD ELDON. As to the first point. If a person gives a bill of exchange for a particular purpose, and that is known to the party who takes the bill, as, for example, if to answer a particular demand, then the party taking the bill cannot apply it to a different purpose; but

[1] See Garnet v. Clark, 11 Mod. 226. — ED.

where a bill is given under no such restriction, but given merely for the accommodation of the drawer or payee, and that is sent into the world, it is no answer to an action brought on that bill, that the defendant, the acceptor, accepted it for the accommodation of the drawer, and that that fact was known to the holder: in such case, the holder, if he gave a *bona fide* consideration for it, is entitled to recover the amount, though he had full knowledge of the transaction.[1]

Verdict for the plaintiff.[2]

CHILDS *v.* MONINS AND BOWLES.

IN THE COMMON PLEAS, FEBRUARY 10, 1821.

[*Reported in* 2 *Broderip & Bingham*, 460.]

ASSUMPSIT on a promissory note. Counts for money paid, money had and received, and on an account stated. Pleas for Monins: first, general issue; secondly, *actio non*, because heretofore, to wit, on, &c., at, &c., the defendants were the executors of the last will and testament of Thomas Taylor, deceased, and as such executors they made the promissory note mentioned, in the words following (that is to say): "Ringwould, 28th December, 1816. As executors to the late Thomas Taylor, of Ringwould, we severally and jointly promise to pay to Mr. Nathaniel Childs the sum of £200, on demand, together with lawful interest for the same. J. Monins, Phineas Bowles, executors." The defendant Monins further pleaded *plene administravit verunt præter*. Plea for the defendant Bowles: general issue. Replication, joining issue with Monins on his first plea, and with Bowles on his plea. Demurrer to the second plea of Monins, for the following causes: that the defendants have, by the note mentioned, made themselves personally responsible to the plaintiff; and that the said defendants have in and by the said note admitted that they have assets in their hands for the payment of the said note; and that it does not appear that the said note was given for a debt of the said Thomas Taylor, but may have been given for a debt of the said executors,

[1] A portion of the case, involving the same point as English *v.* Darley, *supra*, p. 118, has been omitted. — ED.

[2] Bank of Ireland *v.* Beresford, 6 Dow, 237; Perry *v.* Crammond, 1 Wash. C. C. 100, Buchanan *v.* International Bank, 78 Ill. 500; Thompson *v.* Shepherd, 12 Met. 311; Brown *v.* Mott, 7 Johns. 361; Grant *v.* Ellicott, 7 Wend. 227; Benedict *v.* De Groot, 1 Abb. App. 125; First Nat. Bank *v.* Schuyler, 39 N. Y. Sup'r Ct. 440; Holmes *v.* Paul, 5 Pa. L. J. 461, *accord*. — ED.

since the death of Thomas Taylor; and for that the defendants have promised, in and by the said note, to pay the sum of £200, with lawful interest; and the said defendants could not, in their representative capacity, become liable for the interest due on the said note; and for that the defendants have become personally liable, because they have severally and jointly promised to pay, with interest, the sum in the said note mentioned: which note gives a right of action against the executors of one of the defendants who shall first die, and on that event against the other defendant, as the survivor; and the last-mentioned executor could not be liable, or sued as executor of Thomas Taylor; and that the second plea should have been pleaded in abatement, and not in bar; and that the second plea is in other respects uncertain, informal, and insufficient. Joinder in demurrer.

Taddy, Serjt., in support of the demurrer. The promise to pay is an admission of assets; and, as the payment was to be made with interest, a payment at a future day must be implied. This constitutes a forbearance to sue on the part of the plaintiff, which forbearance raises a sufficient consideration for the defendants charging themselves. It has been expressly decided that, if an executor promises to pay the debt at a future day, it becomes his own debt, to be discharged out of his own estate. Goring *v.* Goring,[1] Trewinnian *v.* Howell,[2] 2 Wms. Saund. 137, b.

Vaughan, Serjt., *contra*. The executors are not personally liable, because they expressly promise as executors, not in their own right; and there is no sufficient consideration for a promise in their own right. The circumstance of the promise having been made in writing does not alter the case; for the Statute of Frauds, in enacting that an executor shall not be personally charged, except by his own writing, has not enacted that even by such writing he shall be charged in cases where he would not have been liable at common law. Rann *v.* Hughes.[3] The promise to pay at a future day should, in order to charge the executor, be express, and not merely deducible by inference.

Taddy, in reply, was stopped by the court.

DALLAS, C. J. It has been urged that the defendants cannot be personally liable, because this is only a promise to pay as executors. Whether or not the promise be such, must depend not on those words alone, but on the words of the whole instrument taken together; and what are they? "As executors to the late Thomas Taylor, of Ringwould, we severally and jointly promise to pay to Mr. Nathaniel Childs the sum of £200 on demand, with lawful interest for the

[1] Yelv. 10. [2] Cro. Eliz. 91. [3] 7 T. R. 350, n.

same." Take first the words "on demand." Suppose a demand had been made immediately: do not the executors, by subjecting themselves to such a demand, admit they have assets to satisfy it? If they meant to limit their liability, why did they not add to the words as executors the words "out of the estate of Thomas Taylor." But they promise absolutely, and further add an engagement to pay interest: when, therefore, by the engagement to pay interest they have induced the plaintiff to suspend his clear and admitted demand, by so doing they make the promise personal and individual. The plea further says, they have fully administered: so they may have done at the time of plea pleaded; but they do not say they had no assets at the time the note was given. If executors were not liable on such a promise, they would be enabled, by making such a promise, to defraud any individual among their testator's creditors. This, too, is a promise, which, from the circumstance of interest being added, necessarily imports a payment at a future day, and an executor promising to pay a debt at a future day makes the debt his own.

PARK, J., concurred.

BURROUGH, J. The plea is inapplicable to the count. The insertion of the words "as executors" cannot alter the case, if, on the whole instrument, the parties appear liable. That is clearly the case in the present instance; for, by promising to pay on demand, the defendants admit assets; and, by promising interest, they show in effect that the debt was to be paid at a future day; as they could not charge the estate of the testator with interest, they must pay it out of their own pockets.

RICHARDSON, J. We must look at the whole instrument, not confining ourselves to the words "as executors;" and from the whole instrument it appears that the defendants are personally liable. They promise severally and jointly, which is not usual with executors. They promise to pay on demand, and with interest, which is clearly a compensation for forbearance. It may be true now that they have fully administered, but that is no answer to the plaintiff, who was entitled to be paid in 1816. Goring *v.* Goring is in point; but there are other cases. Barry *v.* Rush,[1] Worthington *v.* Barlow.[2]

Judgment for the plaintiff.[3]

[1] 1 T. R. 691. [2] 7 T. R. 453.

[3] York *v.* Pearson, 68 Me. 587, *accord.*

Ten Eyck *v.* Vanderpoel, 8 Johns. 120; Schoonmaker *v.* Roosa, 17 Johns. 301; Bank of Troy *v.* Topping, 9 Wend. 278, *contra.*

See Barnard *v.* Pumfrett, 5 My. & Cr. 71; Livingston *v.* Gaussen, 21 La. An. 286; Curtis *v.* Bank of Somerset, 7 Har. & J. 25. — ED.

BRIX v. BRAHAM.

IN THE COMMON PLEAS, JUNE 10, 1828.

[*Reported in* 1 *Bingham*, 281.]

ASSUMPSIT for goods sold and delivered, and on two bills of exchange, amounting to £54, indorsed by the defendant to the plaintiff. The defendant pleaded in bar his bankruptcy and certificate.

At the Middlesex sittings after Hilary term last, it appeared that the goods, to the amount of upwards of £80, were sold to the defendant in 1812; that in 1815 a commission of bankrupt was sued out against him, under which the plaintiff did not prove his debt; but that the defendant, subsequently promising payment, indorsed to the plaintiff the bills in question, which became due in March, 1819. The defendant obtained his certificate in July. Upon these facts, a nonsuit was directed, with liberty for the plaintiff to move to set it aside, and enter a verdict for £54.

Vaughan, Serjt., having obtained a rule *nisi* to that effect,

Cross, Serjt., showed cause. This case is distinguishable from Trueman *v.* Fenton [1] and from Birch *v.* Sharland,[2] because in each of those cases there was a new consideration for the bankrupt's promise: here there was none such. In Trueman *v.* Fenton, where the bankrupt accepted a bill of exchange for a debt due before his bankruptcy, the consideration for his acceptance was the destruction of two other bills due before the bankruptcy; and in Birch *v.* Sharland, where the bankrupt was in execution, and gave a bond and warrant of attorney to obtain his liberty, the court expressly held that this was a new debt arising upon a new consideration, and that the old debt was thereby extinguished. In the present case, there was no new debt or consideration; and the old one, being due before the bankruptcy, was provable under the commission, and extinguished by the certificate. The defendant's promise, therefore, was without consideration, and the action upon it cannot be sustained.

But the court were clearly of opinion that the debt due before the bankruptcy was a good consideration for the bankrupt's promise; that it was not barred by the certificate, and would have been available, even if made after the certificate had been obtained.

Rule absolute.[3]

[1] Cowp. 544. [2] 1 T. R. 715.

[3] Clark *v.* Clark (Court of Session, January 5, 1869); *In re* Merriman, 44 Conn. 387, *accord.* — ED.

J HOLLIDAY, an Infant, by W. Holliday, his Father and next Friend, v. ATKINSON and Others, Executors of M'Knight.

In the King's Bench, Easter Term, 1826.

[*Reported in* 5 *Barnewall & Cresswell*, 501.]

Assumpsit on a promissory note given by the testator to the plaintiff for £100, dated July 19, 1821, payable six months after date, and expressed to be for value received. At the trial before Hullock, B., at the Carlisle summer assizes, 1825, it appeared that the plaintiff at the time when the note was made was only nine years old. The testator was then in an imbecile state, and died a few months after. It appeared that the testator was intimate with W. Holliday, but no evidence of consideration was given. The learned judge told the jury that the note, being for value received, was *prima facie* evidence of some legal consideration; that it was not necessary to prove the consideration, but the defendant should have disproved it; that many good considerations might have existed; and that affection towards the plaintiff, or gratitude to his father, or an intention to avoid the legacy duty, would suffice. But that if they thought fraud had been practised, or the maker did not know what he was doing, they ought to find for the defendants. A verdict having been found for the plaintiff, a rule *nisi* for a new trial was obtained in Michaelmas term, against which

Scarlett and *Patteson* showed cause. The only question made at the trial was respecting the competency of the testator to make the note. There was no evidence to impeach the consideration. It was therefore unnecessary for the plaintiff to prove it, particularly as the note was expressed to be for value received, which raises a presumption that a good consideration was given. Then, with respect to the observations of the learned judge, Woodbridge *v.* Spooner [1] is a case where a note was given "for value received, and his kindness to me," and the consideration must have been held sufficient, for the plaintiff recovered without proof of any actual consideration given. In Lee *v.* Muggeridge,[2] a moral consideration was held sufficient. In Tate *v.* Hilbert,[3] Lord Loughborough would not decide that a note was invalid which was delivered as a gift. Here the motive might be to avoid the legacy duty.

[1] 8 B. & A. 233.
[2] 5 Taunt. 36.
[3] 2 Ves. Jr. 111; 4 Br. Ch. Ca. 286.

Brougham and *Wightman*, contra. There is no doubt that a consideration might have been presumed in this case; and, had the learned judge left it to the jury with that observation only, there would not have been any ground for this application. But he pointed out, as good considerations, affection towards the child or gratitude to the father; and it is impossible to say that the verdict was not founded upon the supposition that one or other of those considerations was the real one for giving the note.

ABBOTT, C. J. I think that this case must be sent to a new trial. I agree that where a note is expressed to be for value received, that raises a presumption of a legal consideration sufficient to sustain the promise; but that is a presumption only, and may be rebutted. Now we find that this note was given to a boy only nine years old, whose father was living, and that the donor was in a state of imbecility, and not far from his death. It then became a question for the jury whether the note was given upon any legal consideration; and I think that the direction given to them as to the sufficiency of gratitude to the father or affection to the son was improper. As at present advised, I should also think that the intention to avoid the legacy duty would not be sufficient; for then the note would not be payable until after the donor's death, and a promissory note is not good as a *donatio mortis causa*.[1] But, if a second verdict should be founded on the latter consideration, the question may be put upon the record.

Rule absolute.[2]

[1] Raymond *v.* Sellick, 10 Conn. 480; Weston *v.* Hight, 17 Me. 287; Copp *v.* Sawyer, 6 N. H. 386; Flint *v.* Pattee, 38 N. H. 520; Harris *v.* Clark, 3 Comst. 93 (overruling Parker *v.* Emerson, 9 Law Reporter, 76; Wright *v.* Wright, 1 Cow. 598); Craig *v.* Craig, 3 Barb. Ch. 76; Curry *v.* Powers, 70 N. Y. 212; Hamor *v.* Moore, 8 Oh. St. 239; Hall *v.* Howard, Rice, 310; Brown *v.* Moore, 3 Head, 671; Holley *v.* Adams, 16 Vt. 206; Smith *v.* Kittridge, 21 Vt. 238, *accord*.

See Jones *v.* Deyer, 16 Ala. 221. — ED.

[2] Prior to the case of Rann *v.* Hughes, 7 T. R. 350, note *a*, no authority can be found for the view that absence of consideration is a defence to an action upon a bill or note. Blackstone says, 2 Bl. Com. 446: "If a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment; for every bond from the solemnity of the instrument, and every note from the subscription of the drawer, carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both as against the contractor himself, but not to the prejudice of creditors or strangers to the contract."

In Easton *v.* Pratchett, 1 C. M. & R. 798, Parke, B., said, p. 800: "The plea is not inconsistent with the fact that the bill was indorsed over by the defendant to the plaintiff as a gift. It would be insufficient, on that ground, if the cases are correct, which tend to show that an action will lie on such indorsement. The latest decision (Holliday *v.* Atkinson) is against such an action lying against the giver by the

RIDOUT, Executor of RIDOUT, v. BRISTOW *et Uxor.*

In the Exchequer, Michaelmas Term, 1830.

[*Reported in* 1 *Crompton & Jervis*, 231.]

Assumpsit upon a promissory note made by the wife of the defendant *dum sola*, widow of the plaintiff's testator's son, for £100, expressed to be payable to the testator twelve months after date, "for value received by my late husband." Plea, *non assumpsit.*

At the trial before Bolland, B., at the last Salisbury assizes, the plaintiff having proved the note, it was objected for the defendant that the note, upon the face of it, was a voluntary note for the payment of the debt of another person, without consideration, and was

person to whom such indorsement is made; but the authorities are contradictory, and the law is, perhaps, not to be considered as settled on that point."

In Livingston *v.* Hastie, 2 Cai. 246, Livingston, J., said, p. 247: "Whether the mere want of consideration, even between the original parties, can be alleged against a promissory note, or a bill of exchange, may well be doubted. It is not necessary, as in other simple contracts, to state a consideration in the declaration: the instrument itself imports one, and in this respect partakes of the quality of a specialty. Nor is the plaintiff bound to prove his giving any value for such paper, unless when he sues as bearer of a bill, transferable by delivery, and that under suspicious circumstances. Grant *v.* Vaughan. No case can be found where the want of consideration alone has been admitted as a good defence. As against the payee, the maker, it is true, has been permitted to show, not a want, but a failure of consideration; and in all cases he may insist on the illegality of it. Chitty, in his treatise on Bills, says that the want of consideration may be relied on, but not one of the decisions which he cites will bear him out."

In Bowers *v.* Hurd, 10 Mass. 427, Parker, J., delivering the opinion of the court, said, p. 429: "Now, we do not admit that, when one voluntarily makes a written promise to another to pay a sum of money, the promise can be avoided merely by proving that there was no legal and valuable consideration subsisting at the time; any more than, if he actually paid over the amount of such note, he can recover it back again because he repents of his generosity."

In Law *v.* Humphrey (Court of Session), July 20, 1876, Lord President Inglis said: "Even if the defender had proved the want of consideration which he alleges, it would have been of no use to him. If the bill was validly the deed of Humphrey, that was enough."

The doctrine, however, that a promissory note made as a gift does not bind the maker to the donee must now be regarded as an established exception to the rule that negotiable paper is binding without a consideration. Hulse *v.* Hulse, 17 C. B. 711; Hill *v.* Wilson, L. R. 8 Ch. 894, 901 (*semble*); Blanchard *v.* Williamson, 70 Ill. 647; Potter *v.* Earnest, 45 Ind. 416; Boutelle *v.* Cowdin, 9 Mass. 254; Hill *v.* Buckminster, 5 Pick. 391 (overruling Bowers *v.* Hurd, 10 Mass. 427); Parish *v.* Stone, 14 Pick. 198; Voorhees *v.* Woodhull, 33 N. J. 494, 498; Pearson *v.* Pearson, 7 Johns. 26; Fink *v.* Cox, 18 Johns. 148; Phelps *v.* Phelps, 28 Barb. 121; Pendleton *v.* Pendleton, 1 Th. & C. 95; Starr *v.* Starr, 9 Oh. St. 74; *In re* Cowen, 8 Pittsb 471. — Ed.

therefore void. The plaintiff then gave evidence of liabilities incurred by the testator on behalf of his son, the late husband of the defendant's wife, and of some payments in respect of those liabilities. The defendant called a witness, who proved a declaration by the plaintiff's testator, that his son had died worth worse than nothing; for he owed him several hundred pounds. This evidence was left to the jury, who found a verdict for the plaintiff; and the learned Baron gave the defendant leave to move to enter a nonsuit.

E. Lawes, Serjt., accordingly, in this term, obtained a rule for that purpose, against which —

Follett now showed cause. The question in this case is whether, from what appeared on the face of the note, the plaintiff ought to have been nonsuited on the ground that there was no sufficient consideration between the parties. It is quite an elementary principle that a promissory note imports a consideration, and that it lies on the defendant to impeach it. The only way in which the objection, as arising on the face of the note, can be put, is this, that a legal consideration is negatived by what appears on the note. It is clear, however, that if A owe B a debt, and a third person choose to give B a note, such debt is a sufficient consideration to bind the maker of the note. The cases cited as to the consideration necessary to support a promise to pay a debt due from a third person are totally inapplicable to this case; for the plaintiff here is not suing on any special agreement to pay the debt of a third person, but on an instrument which imports a consideration. It is said, however, that the defendant had no assets as executrix of her late husband. That did not appear; but, if it did, it was quite immaterial. In Child *v.* Monins, where the defendants gave to a creditor of their testator a promissory note, whereby, "as executors, they severally and jointly promised to pay the plaintiff, on demand, with interest," it was held that such note made the defendants personally liable; and a plea that they were executors, and had given the note as such, and *plene administraverunt præter* was held bad on demurrer. But, even if it had been necessary to prove any consideration, it appeared that the plaintiff's testator had made himself liable for the debts of the defendant's late husband; and evidence was given to prove payments under such liabilities, and the jury found that the plaintiff was entitled to recover the whole amount of the note.

E. Lawes, Serjt., and *Barstow*, contra. The objection is that on the face of this note a valid consideration is negatived. It imports a voluntary promise to pay the debt of another without consideration. Child *v.* Monins is inapplicable to this case. The judgment proceeded upon circumstances apparent in that case, which do not exist in this. The promise to pay, as executors, was an admission that the defend-

ants were executors, and the stipulation to pay with interest showed the present existence of a debt, and a forbearance, which was a sufficient consideration. Here there was proof that there were no assets; and the note, not being payable with interest, does not import a forbearance. In that case also, the promise was to pay jointly or severally, which made the defendants personally liable. This is, in fact, an indemnity note; and it was incumbent on the plaintiff to show that he was damnified. He did not show that he was damnified, for the evidence upon that subject totally failed. But this note is also void, because it does not sufficiently express a consideration within the Statute of Frauds. Wain *v.* Walters,[1] Rann *v.* Hughes.[2]

Bayley, B. This is an application to set aside a verdict for the plaintiff, and to enter a nonsuit. It is an action upon a promissory note. A promissory note, *prima facie*, imports a consideration; and it is not necessary to give evidence of consideration *aliunde*. But it is insisted that, as the note in question imports on the face of it a peculiar description of consideration, that circumstance varies the general rule, and throws the burthen of proving consideration upon the plaintiff; and it is argued that this note is void upon the face of it for want of expressing assets or forbearance. It is perfectly clear that if, instead of taking a note, you take from a third person a written security, which cannot be supported without proof of consideration, that security must, upon the face of it, import a consideration, and there must be evidence to prove such consideration. But you may bind yourself by an instrument which in its form imports consideration, without expressing the consideration, or proving it *aliunde*.

In this case, the party signed a promissory note, expressed to be for value received by her late husband. She appears to have been the administratrix; but even admitting that she was not, and supposing that, out of respect to the memory of her late husband, she had agreed to give a note for what was due from him, would not such a note be binding? I take it that it would. There is a good consideration, which makes it reasonable that the security should be given: it is not a case of the want of a consideration, but of the existence of a consideration.

The case of Popplewell *v.* Wilson establishes that a note is binding, though it purport, on the face of it, to be for the debt of a third person. But it is said that that was the case of a promise to pay the debt of a living person, and that therefore there was a forbearance, which is a good consideration. That answer does not show that the case is inapplicable to the present question, because there may be forbearance

[1] 5 East, 10. [2] 7 T. R. 350, n.

to the representatives of a dead man, as well as forbearance to a man whilst living.

But it is argued that there is in this case an absence of consideration, because, it is said, that there was evidence that there were no assets. That, however, did not appear, though there was evidence that there might ultimately be a failure of assets; for the evidence only showed that the son died considerably indebted to the testator, and there was no proof that there was no household furniture or other assets.

If an administratrix take upon herself to give a security, which may have the effect of inducing forbearance, and which purports to bind her individually, is it competent for her to say, you must prove assets? To my mind, the act of giving such a security supersedes the necessity of an investigation as to there being assets. It seems to me that the words "value received by my late husband" do not make the proof of assets necessary; and I go still further, and say that it was not competent for her to show that there were no assets.

The cases upon the Statute of Frauds do not apply to the present, nor do the cases in which it has been held that a promise to pay the debt of a third person without consideration is *nudum pactum*. It is just that a promise to pay that which I am under no legal or moral obligation to pay should be considered as *nudum pactum;* but this does not apply to an instrument importing a consideration, and which may induce forbearance to the party. I am therefore of opinion that, in this case, a consideration must be taken to exist, and that the maker of such an instrument is at least *prima facie* liable to pay it.

I doubt much, whether, upon an instrument worded like the present, it is competent for the party to start up and say that it was given merely as an indemnity. It is an attempt to prove by parol something inconsistent with the written document. You may prove failure, or want, or illegality of consideration; but I am not aware of any case in which a party has been allowed to prove a difference of consideration. But it is not necessary to decide that point in this case, because upon the evidence it appeared that various sums had been paid, which the evidence for the defendant, if admissible, did not disprove.

GARROW, B., concurred.

VAUGHAN, B. I am of opinion that there is no foundation for this rule. It was moved on the ground that this was not a note in the usual form, but an indemnity note merely. Upon looking at the note, it appears to be in the usual form, and like all other notes, with the exception of the words "by my late husband." The plaintiff, on proof of this note, might have closed his case; but he was induced to go into evidence of the consideration, and the jury found that there

was a sufficient consideration. Even if it were competent for the defendant to prove that this was merely an indemnity note, upon the evidence the plaintiff is entitled to recover; but I think that it would be going a great way to allow the defendant to contradict the written instrument, and show that it was given as an indemnity merely.

BOLLAND, B. I agree with the rest of the court that this rule should be discharged. At the trial, I reserved the point, because the note was drawn in somewhat an ususual form.

BAYLEY, B. There are cases which establish that you cannot give parol evidence inconsistent with the form of the note. You cannot vary, by parol evidence, the nature of the obligation. The authorities go to show that parol evidence is inadmissible to vary the time for payment expressed in the note. In Rawson *v.* Walker,[1] a note was payable on demand, and evidence was offered to show a liability on a contingency only. Lord Ellenborough said, "I am ready to admit any evidence for the purpose of showing that the consideration of the note was illegal; but I cannot receive parol evidence inconsistent with the terms of the note." I am therefore of opinion that the defendant was not at liberty to give the evidence in question, as it was inconsistent with the terms of the note. *Rule discharged.*

SOWERBY AND OTHERS *v.* JOHN BUTCHER.

IN THE EXCHEQUER, HILARY TERM, 1834.

[*Reported in* 2 *Crompton & Meeson*, 368.]

ASSUMPSIT on a bill of exchange, dated the 8th of March, 1832, for £96 9*s.* 1*d.*, payable to the plaintiff's order, drawn by the defendant upon and accepted by one William Devey. Plea: the general issue.

At the trial before Denman, C. J., at the last summer assizes for the county of Northumberland, the defendant set up as a defence the want of consideration. To prove this, the clerk of the plaintiff was called, who stated that in the latter end of February, 1832, the plaintiffs, who

[1] 1 Stark. 361.

[2] Balfour *v.* Sea Co., 8 C. B. N. S. 800; Thompson *v.* Gray, 63 Me. 228; Mansfield *v.* Corbin, 2 Cush. 151; Fish *v.* Jacobsohn, 2 Abb. App. 182; Sherwood *v.* Archer, 10 Hun, 78, *accord.*

Stoudenmire *v.* Ware, 48 Ala. 589; Watson *v.* Reynolds, 54 Ala. 191, *contra.*

In accordance with the principal case, an acceptor is bound by an acceptance given after the transfer of the bill to the plaintiff. Commercial Bank *v.* Norton, 1 Hill, 501; Mechanics' Bank *v.* Livingston, 33 Barb. 458; Bank of Louisville *v.* Ellery, 34 Barb. 630; First Nat. Bank *v.* Schuyler, 39 N. Y. Sup'r. Ct. 440. — ED.

were owners of the Waldridge Colliery, near Newcastle, upon the application of Robert Butcher, the defendant's brother, a broker at Newcastle, shipped a cargo of coals on board the "Isabella," consigned to Messrs. Devey, of Rochester. Robert Butcher signed a bill for the amount of the cargo, which was forwarded to Messrs. Devey for acceptance; but, the bill being drawn at too short a date, it was returned; and Robert Butcher desired the witness to send another bill at a proper date, drawn upon William Devey alone. The witness, having drawn the second bill, went to the counting-house of Robert Butcher, where he saw the defendant, who told him his brother had left Newcastle. The witness then asked the defendant if he had any objection, as his brother was not there, to sign the bill, observing that it would be a convenience to the plaintiffs to get the bill signed. The defendant made no objection, but immediately signed the bill. The witness said that he was not aware that the defendant had any thing to do with the "Isabella's" cargo; that he had not communicated to the defendant any part of the transaction until he had asked him to sign the bill, and that there was no consideration between the plaintiffs and the defendant with reference to that bill; that the bill was signed at the request of the witness, and not on the offer of the defendant; that the ship had then sailed some days with the cargo; and that, after Robert Butcher left Newcastle, the defendant attended to his business. The witness said that he agreed that the first bill should be given up, and that it was destroyed two or three days after the second bill was given in the defendant's counting-house, when no one was present. It was proved by Robert Butcher that the defendant had nothing to do with the cargo of coals; and that the defendant was a coal-factor in London, who, on his brother's leaving Newcastle in consequence of embarrassments, had come there to investigate his affairs.

It was objected, for the defendant, that the plaintiffs ought to be nonsuited, it being proved that no consideration passed, and that the plaintiffs were aware of it. The Lord Chief Justice expressed his opinion that these facts did not amount to a defence in point of law, and directed the jury to find for the plaintiff, reserving leave to the defendant to move to enter a nonsuit. *Cresswell* having in Michaelmas term obtained a rule accordingly, cause was now shown by

F. Pollock and *Ingham*, for the plaintiffs. The defendant, by putting his name to this bill, rendered himself personally liable on it, although he received no actual consideration, and acted only as the agent of his brother, because he has not excluded his personal liability by stating that he subscribed it for his brother, or *per* procuration of his brother. In Le Fevre *v.* Lloyd, where a broker who had sold goods drew a bill on the purchaser for the amount in favor of his

principal, without any consideration for so doing, but merely for the purpose of facilitating business, the principal not being in London when the goods arrived, he was held liable on the bill to his principal, on the ground that, by putting his name to the bill, all the legal consequences of the act followed, and that he was equally liable with any other party whose name was on the bill. And in Leadbitter *v.* Farrow,[1] where an agent to a country bank, to whom the plaintiff sent a sum of money, in order to procure a bill upon London, drew in his own name for the amount upon the firm in London, the two firms being the same, it was held that the agent was liable as drawer, although the plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money. Lord Ellenborough, C. J., there said: "Unless he says plainly, 'I am the mere scribe,' he becomes liable."

Cresswell and *R. Alexander*, contra. The coals were shipped before the defendant came to Newcastle, and the bill was not drawn by him in the course of business, as the defendant only came there to investigate his brother's affairs. He did not profess to act, nor can he be treated, as an agent. The second bill was merely an accommodation bill, as the defendant received no benefit, and the plaintiffs parted with no right; and the defendant signed the bill at the request of the plaintiffs. If it be doubtful whether there was any consideration, that was a question for the jury. The case of Le Fevre *v.* Lloyd is distinguishable, as there the party was a broker, and the court seemed to have proceeded on the ground that the vendors relied upon his responsibility; and it is observed by the court, in giving judgment, that "the vendors, upon receiving it in consequence of their good opinion of Lloyd, dismiss from their minds all care about the solvency of the purchaser." Leadbitter *v.* Farrow is also distinguishable, as value was there given to the agent, there could be no doubt of the consideration; but that is not so here. There the plaintiff might be presumed to consider the defendant liable; and Lord Ellenborough, C. J., says: "Although the plaintiff knew the defendant to be an agent to the country bank, he might not know but that he meant to offer his own responsibility." There the defendant was actually an agent. Here he was a mere third person. In Collins *v.* Martin, the principle is laid down that the truth of the transaction between the respective parties to the bill may be entered into to destroy the *prima facie* consideration of a bill; and the cases cited do not break in upon the rule there laid down. Here the defendant in fact only signed this bill for his brother, at the request of the plaintiffs, and for their convenience, they having a perfect knowl-

[1] 5 Man. & S. 345.

edge that the defendant had received no consideration. In Thomas v. Bishop,[1] the court says: "In a case of a bill addressed to the master, and underwrote by the servant, undoubtedly the servant would not be liable, but his acceptance would be considered as the act of his master." So here this must be considered as the act of John Butcher, as the bill was brought to his counting-house for the purpose of being signed by him.

BAYLEY, B. In this case, there was no question for the jury, but simply a question for the judge to decide; and I think he did right in directing a verdict for the plaintiffs. The court may think possibly that the defendant unguardedly signed the bill, and did not consider the consequences of putting his name to it; but it is impossible to say that there was no consideration for so signing it, or that the bill was drawn for the accommodation of the plaintiffs. If for the accommodation of any one, it was for that of Robert Butcher. The facts stand thus: The plaintiffs supply goods, consigned to Devey & Co., for which Robert Butcher is liable, and for which he draws a bill on Devey & Co., which makes him responsible, unless they pay. This bill is returned, and, in consequence of the return, the plaintiffs have a right to sue Robert Butcher, but, instead of doing that, they prefer having another bill. Robert Butcher would be bound to draw it, but he leaves Newcastle: why he left, and for what time, the plaintiffs might be ignorant; and, whilst his affairs were under investigation, it is probable that his brother would not suffer any thing to transpire which would be likely to injure him amongst his creditors. Under these circumstances, the plaintiffs, having a right to another bill, apply at the counting-house, and see the defendant. He might have given a bill or not, as he thought fit, and he might have given a bill, stating on the face of it that he drew it for Robert Butcher; and if he had stated that he drew it as agent, and had asked for a written acknowledgment that he should only be held liable as agent, he would have acted the part of a prudent man, and have got rid of the personal obligation, to which, by signing generally, a party is liable. But it is said that there was no consideration for the defendant's binding himself personally That is not necessary. He professes to bind himself personally; and the answer to the objection, that there was no consideration, is that the plaintiffs had a right to have a bill which should bind somebody. The debt of a third person is a good and valid consideration, for which a party may bind himself by a bill; and the consideration need not of necessity be such as would enable the plaintiffs to sue on a special contract. If there is a detriment to the plaintiffs, and they have a right to insist upon a bill from any person, that is enough; and it is not

[1] 2 Strange, 955.

sufficient for the defendant to show that there was not such consideration as would support an action, independently of the bill. In this case, there was sufficient evidence of consideration, and that the bill was not drawn for the accommodation of the plaintiffs. They would not have cared whether the bill was drawn in the name of John or Robert, in the present or in any other form; but, being given in this form, they have a right to insist on the consequences which thereby attach.

VAUGHAN, B. I am of the same opinion. The question is whether there was any evidence to be left to the jury on which they could be warranted in inferring that between these parties the bill ought not to be enforced. There is not one fact or circumstance to authorize such a finding. What are the circumstances under which the bill is signed? The defendant is found in Robert Butcher's counting-house, acting at least as if he was conducting his business, although it is said he was there only to investigate his affairs; and, upon the statement made to him by the plaintiff's clerk, he signs the bill without any objection or difficulty. Now what ought he to have done, if he did not intend to make himself personally responsible? Why, he ought to have objected to sign, except as agent. As to the objection that there was no consideration, the second was to be a substitute for the first bill, which was destroyed; but, without adverting to that, the great point upon which the case turns is this, that, if a party puts his name to a bill, he becomes personally responsible, unless in terms he qualifies that responsibility.

GURNEY, B. The character in which the defendant appeared to others was not confined to the mere investigation of his brother's affairs, but he might be considered as representing his brother.

Rule discharged.

NELSON AND WIFE *v.* SERLE.

IN THE EXCHEQUER CHAMBER, HILARY TERM, 1839.

[*Reported in* 4 *Meeson & Welsby*, 795.]

THIS was a writ of error from the judgment of the Court of Exchequer in the case of Serle *v.* Waterworth;[1] the defendant, Mrs. Waterworth, having since married Nelson, the now plaintiff in error. It was an action of debt on a promissory note for £24 1*s.* 4*d.*, value received, dated the 3d January, 1837, made by the defendant (the now plaintiff in error), payable twelve months after date to the plaintiff

[1] 4 M. & W. 9.

The defendant pleaded that one Joseph Waterworth, before and at the time of his death, to wit, on the 2d January, 1837, was indebted to the plaintiff in a certain sum of money, to wit, the sum of £24 1*s.* 4*d.*, for the price and value of goods by the plaintiff before then sold and delivered to the said J. Waterworth, which sum was due and owing to the plaintiff at the time of the making of the promissory note in the first count mentioned; and that the plaintiff, after the death of the said J. Waterworth, and before the making of the said note, to wit, on the 2d January, 1837, applied to the defendant for payment thereof. Whereupon, in compliance with the said request, the defendant, after the death of the said J. Waterworth, for and in respect of the said debt so then remaining due to the plaintiff as aforesaid, and for no other consideration whatever, then made and delivered the said note to the plaintiff; and the defendant further says that the said J. Waterworth died intestate, to wit, the same day and year aforesaid, and that, at the time of the making and delivery of the said note to the plaintiff as aforesaid, no administration had been granted of the estate and effects of the said Joseph Waterworth; nor was there at that time any executor or executrix of the estate and effects of the said Joseph Waterworth; nor was there at that time any person liable for the said debt so remaining due to the plaintiff as aforesaid. And the defendant further says that there never was any consideration for the said note except as aforesaid.[1] Verification. Replication, *de injuria*, on which issue was joined.

The Court of Exchequer having held that the plea was not a sufficient answer to the action on the note, a writ of error was brought, which was now argued by

Addison, for the plaintiffs in error. The question in this case is whether this plea is a good answer to the action, or whether judgment *non obstante veredicto* ought to have been entered for the plaintiff. The averment at the end of the plea, that there never was any consideration for the note, was overlooked on the argument in the court below.[2] The defence set up by the plea in reality was that there never was any consideration for the giving of the note. In the court below, it was said that the forbearance to sue would be a good consideration; but it does not appear that there was any connection or relationship between the defendant below and the deceased, in respect of which she could be liable. [TINDAL, C. J. You say it is the same as if a perfect stranger passing by at the time, on being told that a

[1] See note below.

[2] That averment was by some mistake omitted in the briefs in the case of Serle v. Waterworth, and the court below gave judgment on the assumption that there was no such averment in the plea.

debt was due, had given the note.] Certainly. The case of Jones v. Ashburnham [1] is expressly in point. There the plaintiff declared that A, since deceased, was indebted to him so much, and that, after his death, in consideration of the premises, and that he, at the instance of the defendant, would forbear, and give day of payment of the debt (not stating to whom he was to forbear), the defendant promised, &c.; and it was held to be no consideration for the promise; for a promise could only be sustained on a consideration of benefit to the defendant or of detriment to the plaintiff; and, unless there were some person whom the plaintiff could have sued for his debt, his forbearance was no detriment to him. That case is on all fours with the present, and shows that forbearance to a person not liable is no consideration: the only difference is that this was the case of a promissory note, which imported a consideration, and that since the new rules such a defence must be pleaded. In the judgment in the court below, Lord Abinger, C. B., says: "It appears to me that the real question is whether, on the face of the declaration and plea together, there could be any consideration for this note, as between the plaintiff and defendant; and I think that the plaintiff's being placed in the condition that he could not, at all events, sue the defendant for twelve months, although she took out administration in the mean time, was a sufficient consideration." And Parke, B., says: "If it had shown that there were no assets, it would probably have gone far enough to negative all consideration; but it does not; and the effect of the note, at all events, is to tie up the plaintiff's hands against the defendant, in case she should take out administration or intermeddle with the assets, for a year." This plea, it is submitted, does contain a substantial averment that there were no assets. Again, what detriment was it to the plaintiff "to tie up his hands," where he never had any right to recover against the defendant? Or what benefit was it to the defendant? If there had been any other consideration, it was for the plaintiff to show that by his replication.

Wightman, contra. The judgment of the court below was correct. The defendant is under a mistake in applying the expression "consideration" to the circumstance of her having assets or not. The question was whether, there being a debt due, there could be a consideration of forbearance. [TINDAL, C. J. Have you any right to guess that by any accident the defendant would take out administration in the course of the year?] In Ridout v. Bristow, where a widow gave a promissory note "for value received by my late husband," it was held that the note was valid on the face of it. In that case, Bayley, J., says: "You may bind yourself by an instrument which, in its form, imports

[1] 4 East, 455.

consideration, without expressing the consideration or proving it *aliunde*;" and he cites the case of Popplewell *v.* Wilson, as establishing "that a promissory note is binding, though it purport on the face of it to be for the debt of a third person." So here the plaintiff contends that if a stranger is told that a debt is due, and he gives a promissory note, which imports a consideration, it would be binding. [BOSANQUET, J. You say that a debt is due; but in this case there was no person that could be sued.] There was a debt due from a person who is dead, and that is the same, as respects consideration, as if it were a living person, because there may be assets, or at least respect for the memory of the deceased. [BOSANQUET, J. In Ridout *v.* Bristow, there was a *prima facie* right to take out administration.] The consideration here is a debt from the deceased Joseph Waterworth; and, unless the plea exclude every case in which there may be a good consideration, that is sufficient. The defendant was bound to exclude every consideration whatever. There was nothing to show she was not executrix, or might not become so. The defendant was bound to show that the promissory note, which imports a consideration, had in reality no value. If it might be for good consideration, it is sufficient. The court below say that the defendant has not shown those circumstances which prove that there could be no consideration. A person who gives a promissory note, by so doing, *prima facie* admits that he has had value for it.

Addison, in reply, In Ridout *v.* Bristow, the note was proved (under *non assumpsit*) to have been given by the widow "for value received by her late husband." Here it does not appear that the defendant was at all connected with the deceased. Alderson, B., said, in this case, in the court below, that the question in Ridout *v.* Bristow was "whether, it being expressed on the face of the note that it was given for the debt of her late husband, that necessarily showed a want of consideration; and the court held that it did not, because the plaintiff's remedy might be delayed against the executor or administrator; but here there is a distinct averment that no person was liable for the debt." The doctrine contended for on the other side is extravagant.

LORD DENMAN, C. J. It appears to me that, in reversing this judgment, we do not interfere with the law pronounced by the judges of the Exchequer, because they acted on Ridout *v.* Bristow; and it turns out that the facts of that case do not apply. It appears that there the defendant was the wife of the intestate, and his administratrix, and the question there arose on *non assumpsit*; and so it must have been in Popplewell *v.* Wilson. *Judgment reversed.*

JONES AND ANOTHER v. JONES AND ANOTHER.

IN THE EXCHEQUER, HILARY TERM, 1840.

[*Reported in* 9 *Law Journal Reports, Exchequer, New Series*, 178.[1]]

DEBT by the payees against the makers of a promissory note for £35, dated on the 6th of June, 1838, and payable on demand, with a count on an account stated.

Plea: as to the first count, that the promissory note therein mentioned was made and given by the defendants to the plaintiffs, for the payment of a certain sum, to wit, the said sum of £35, in the said note mentioned, as and for the purchase-money to be paid to the plaintiffs, for the sale to the defendant, Owen Jones, of a certain cottage and land, by virtue of a certain agreement, then, to wit, on the 6th of June, 1838, made by and between the said Owen Jones and the plaintiffs, for the sale of the said cottage and land; and that the said contract for the said sale of the said tenement was not, nor was any memorandum or note thereof in writing, signed by the said Owen Jones, being the party to be charged therewith, or any person or persons thereunto lawfully authorized by him. And, further, that there was not at any time any consideration or value for the defendant's making the said promissory note, or payment of the amount thereof, except as aforesaid; and the plaintiffs have held, and now hold the same, without any value or consideration. Verification.

Replication, that, at the time of the making of the contract in the first plea mentioned, the defendant, Owen Jones, paid to the plaintiffs a certain sum, to wit, the sum of £4 10*s*., in part satisfaction and discharge of the purchase-money for the said cottage and land in the said first plea mentioned, and was then, to wit, on the 6th day of June, 1838, put into the possession of the said cottage and land, and from thence hitherto hath been and still is in the possession and enjoyment thereof, under and in pursuance of the said contract. And, further, that from the time of the making of the said contract, they, the plaintiffs, have always been, and still are, ready and willing to execute a conveyance of the said cottage and land to the defendant, Owen Jones, according to the said contract. Verification.

Special demurrer, on the ground that the replication neither traverses nor confesses and avoids the plea; that it offers immaterial issues; and that it is multifarious. Joinder in demurrer.

Hayes, in support of the demurrer. The replication alleges, first, a

[1] 6 M. & W. 84, s. c. — ED.

part payment; secondly, that the defendant was let into possession; and, thirdly, that the plaintiffs were willing to convey. There are, therefore, three distinct answers to the plea; and the replication is multifarious. The first two are equally material; and the defendants cannot tell upon which the plaintiffs rely, nor can they take issue on both.

[PARKE, B. Is the plea good?]

The plea is, that the note was given on a parol contract for the sale of land, and that there was no other consideration for it.

[LORD ABINGER, C. B. The defendants allege that the contract was not in writing; but, assuming that the plaintiffs were not bound by the contract, it does not follow that they will not fulfil it. The plea ought to have stated that the plaintiffs had refused to execute the conveyance.]

[PARKE, B. How does it appear from this plea that the defendant, Owen Jones, has not had possession?]

The plea is to be looked at as upon general demurrer; and the allegation that the verbal agreement was the only consideration for the note shows that nothing has passed, except the mere executory contract. Then the agreement is not valid so as to satisfy the Statute of Frauds. It ought to contain in writing the consideration for the promise as well as the promise itself. Wain *v.* Warlters,[1] Saunders *v.* Wakefield.[2] The note, *prima facie*, imports consideration, and is negotiable; but there is no other difference between that and any other promise to pay *in futuro*.

[PARKE, B. We must assume that the note was given for the purchase-money, and that the plaintiffs were ready and willing to transfer the property. Then, the plea does not aver that they were not ready and willing to convey; and though they may not have been bound to perform their contract, yet if they are willing to do so, what right have the defendants to refuse payment of their note?]

This is nothing more than an executory contract for the sale of an estate; and the note is merely a written agreement to pay *in futuro* the purchase-money for that estate, which is by the contract left uncertain, and cannot be supplied by parol.

Watson, contra. First, the plea is bad. It ought to show a total failure of consideration; and, in order to defeat the plaintiff's right of action, it must disclose circumstances under which, if money had been paid instead of a note being given, the defendants would have been entitled to recover it back. Stephens *v.* Wilkinson.[3] That could not be so, unless the plaintiffs had refused to convey, because there would

[1] 5 East, 10.
[2] 4 B. & Ald. 595.
[3] 2 B. & Ad. 320; s. c. 9 Law J. Rep. K. B. 281.

be no failure of consideration. It is consistent with this plea that the cottage and land have been conveyed since the note became due; for the only allegation is that the parol contract was the only consideration for the making or payment of the note. The Statute of Frauds does not apply. A bill given for the debt of a third party is good, without any new consideration. Popplewell v. Wilson, Sowerby v. Butcher.

[PARKE, B. There is also a case of Nelson v. Serle.]

Secondly, the replication is not double. The whole taken together discloses a binding contract in equity. It is also good as matter of law: it shows several things done under the contract which is binding on the defendants. He referred to Poph. 186; Gascoyne v. Smith,[1] Stephens v. Underwood.[2]

Hayes, in reply. In Sowerby v. Butcher, and other cases which have been cited, the consideration was in the contract implied by the bill of exchange, to give time to the third party for payment of the debt. Here the consideration has totally failed, for the bill is payable on demand. There are many cases where a contract could not be enforced, although money paid under it could not be recovered back. The replication discloses several answers at law, and is therefore multifarious; and, inasmuch as it does not state that the plaintiffs are able to convey, it does not satisfy equity.

LORD ABINGER, C. B. By giving the promissory note, payable on demand, the parties have done what is equivalent to the payment of money for a future conveyance. It is clear they are bound to pay the note, unless they show that the plaintiffs have refused to execute the conveyance. I, therefore, think the plea is insufficient.

Leave to amend on payment of costs; otherwise, judgment for the plaintiffs.[3]

COOK v. W. LONG.

AT NISI PRIUS, CORAM WIGHTMAN, J., AUGUST 24, 1842.

[*Reported in Carrington & Marshman*, 510.]

DEBT by the indorsee of a promissory note against the maker.

Plea: no consideration; and that the defendant made the note for the accommodation of R. Long, and that the plaintiff received the note

[1] M'Clel. & You. 338.

[2] 4 Bing N. C. 655; s. c. 7 Law J. (N. S.) C. P. 202.

[3] Paul v. Stackhouse, 38 Pa. 302, *accord*. Hooker v. Knab, 26 Wis. 511, *contra*. Conf. Abell v. Douglass, 4 Den. 305. — ED.

with notice to that effect, that there was no consideration for the delivery of the note to the plaintiff, and that he held it without value.

The defendant's father bought sheep of the plaintiff, and for the payment for them the defendant gave the plaintiff a promissory note in his own name. There was not any consideration to the defendant for the note, nor was the defendant in partnership with his father in any manner.

It was submitted for the defendant that the note in question was for the accommodation of another person, and that the plaintiff taking it with notice took it as described in the plea, with all the consequent disabilities attaching to it as an accommodation note.

WIGHTMAN, J. It is not properly a note for the accommodation of any one: it is a note given and a sum of money due for a bygone debt; but it is an original liability on the part of the defendant, and the consideration of the debt was family affection. I think that on these facts the plaintiff is entitled to his verdict.

Verdict for the plaintiff.[1]

BAKER *v.* WALKER.

IN THE EXCHEQUER, JUNE 27, 1845.

[*Reported in* 14 *Meeson & Welsby*, 465.]

DEBT. The first count of the declaration stated that the defendant was indebted to the plaintiff in the sums of £13 2*s.* 6*d.* and £7 13*s.*, upon a judgment recovered against the defendant. The second alleged that, on the 21st of March, 1844, the defendant made his promissory note, and thereby promised to pay the plaintiff £26 5*s.* three months after the date thereof.

Plea to the second count, as far as the same relates to the sum of £20 15*s.* 6*d.*, parcel of the said sum of £26 5*s.*, that the said promissory note was made and delivered by him the defendant to the plaintiff for and on account of a certain judgment debt of £20 15*s.* 6*d.* recovered by the plaintiff against the defendant, and that, except as aforesaid, there never was any consideration or value for the making or delivery of the said note to the plaintiff.

[1] Jewett *v.* Howe, 1 Woods, 530; Pugh *v.* Durfee, 1 Blatch. 412; Fetters *v.* Muncie Bank, 34 Ind. 251; Walker *v.* Sherman, 11 Met. 170; Pierce *v.* Kittredge, 115 Mass. 374, 376 (*semble*); Seneca Bank *v.* Neass, 5 Den. 329; 3 Comst. 442, s. c.; Mohawk Bank *v.* Corey, 1 Hill, 513; Boyd *v.* Cummings, 17 N. Y. 101; Fish *v.* Jacobsohn, 2 Abb. App. 132; Schepp *v.* Carpenter, 51 N. Y. 602, *accord.* — ED.

Replication, *de injuria.*

Special demurrer, assigning for causes that the general replication *de injuria* is inapplicable to this case, inasmuch as the plea to which it is pleaded involves matter of record, which is not triable by the country.

Joinder in demurrer.

The point marked for argument on the part of the plaintiff was that the plea was bad, as it showed on the face of it a good and sufficient consideration for making the promissory note.

Hugh Hill, in support of the demurrer. The replication is clearly bad, as it puts in issue the matter of record alleged in the plea. [PARKE, B. No doubt the replication is bad, but what do you say to the plea?] Secondly, the plea is good. The promissory note is not stated to be payable to order; and, as it was given without consideration, the party making it was not bound to pay it. It appears by the plea that it was given on account of the judgment debt, and probably on the supposition that it would suspend the remedy upon the judgment until the note became due and was dishonored; but it would not suspend the judgment debt or the remedy to recover it for a single moment, more especially as it was not made negotiable, and it was therefore no consideration whatever for the defendant's promise. In Green *v.* Harrington,[1] which was assumpsit for rent of a house and land upon a demise, on motion in arrest of judgment, it was urged "that no action lay upon this promise, but it is debt for the rent of land, and the assumpsit is of a less nature; as if one be indebted upon an obligation, and that being forfeited he promised to pay it, no action lies, for the debt is due upon the obligation;" which the court agreed to. [PARKE, B. That case is distinguishable from the present, as that is the case of a mere promise, without any security. Would not the plaintiff, by accepting this promissory note, suspend his remedy upon the judgment for three months?] No, not in the present case, as the note was not made payable to order. It amounts to nothing more than a mere naked promise. In an anonymous case,[2] it was held that a promise by a defendant to pay a judgment debt, in consideration that the plaintiff would stay execution thereon, would not support an action of assumpsit. Lord Mansfield, C. J., there says: "If the undertaking had been by a third person in consequence of the forbearance, it would have been a good ground of assumpsit against such third person. But here the promise is by the defendant himself, to pay a debt to which he was before liable upon record; and therefore I am of opinion that such promise is no ground upon which to raise an assumpsit." A mere parol agreement to give

[1] Hutton, 84, 85. [2] 1 Cowp. 128.

time to the principal does not discharge the surety at law. [PARKE, B. This is something more than a parol agreement, it is a security.] In Davis v. Gyde,[1] it was held that a promissory note given by the tenant to his landlord for rent does not extinguish the claim for such rent, which is a debt of a higher nature than that arising upon the note; and that the receipt of such note did not of itself suspend the right of distress until the note was due. [PARKE, B. There was no averment there of any express agreement.] Nor is there here; and it is distinctly alleged in the plea that there was no other consideration for the making or delivery of the note. [PARKE, B. A promissory note given for the debt of a third person suspends the right of action, although no new consideration be given. His lordship referred to Lechmere v. Fletcher.[2] In Davis v. Gyde, Littledale, J., says, "Mease v. Mease,[3] and other cases which are there cited, serve to show that you cannot plead a parol agreement to extend the time for the payment of a specialty debt;" and, *a fortiori*, a debt of record. [PARKE, B. But that does not show the converse, that, it being a debt due on a specialty, it is an answer to an action on a promissory note given for it. If I give a promissory note for the debt of a third person, I am bound to pay it when due. If that be so, I do not see why it is not a suspension of the remedy in the case of a specialty debt. The anonymous case cited from Cowper was that of a simple promise, without any security; but a promissory note is a security.] In this case, the note was not negotiable, and was therefore no suspension of the action upon the judgment. In Popplewell v. Wilson, where it was held that a promissory note for the debt of another was within the statute 3 Anne, c. 9, the note was evidently payable to order; but, where it is not, it will not suspend the time of payment; and therefore the party giving the note gets no benefit from it, and there is no consideration for it. The plea is therefore a good answer to the action.

Hance, contra, was stopped by the court.

PARKE, B. I am of opinion that the plea is bad; for it shows there was a debt in existence on account of which the note was made, and that is sufficient to make the note good. It is like the case of a note given for a debt of a third party, which has been held to be a sufficient consideration. It was so held in Popplewell v. Wilson, and that principle has been acted upon in many other cases. A promissory note, although not a specialty, resembles a specialty, and at all events it is a security. Where a man who has a judgment debt takes from his debtor a promissory note for the amount, payable at a certain time, it must be inferred that he thereby enters into an agreement to sus-

[1] 2 Ad. & Ell. 623; 4 Nev. & M. 462.
[2] 1 C. & M. 623. [3] 1 Salk. 325.

pend his remedy for that period; and, if so, that is a good consideration for the giving of the note. Here, there being a judgment debt, a promissory note is given for the amount of it, and that is evidence of an agreement to suspend the judgment until the note is due, which is a sufficient consideration to support an action on the note. This distinguishes the case from Serle v. Waterworth.[1] I am therefore of opinion that the plea is bad, and that the plaintiff is entitled to judgment.

Anderson, Rolfe, and Platt, BB. concurred.

Judgment for the plaintiff.[2]

MUNROE and Another v. BORDIER and Another.

In the Common Pleas, November 30, 1849.

[*Reported in* 8 *Common Bench Reports*, 862.]

Wilde, C. J., now delivered the judgment of the court.[3]

The first count of the declaration alleged that the defendants, on, &c., in London, made their bill of exchange in writing, and directed the same to certain persons in parts beyond the seas, to wit, to certain persons carrying on business in the kingdom of France under the style of A. de Wain & Co., and thereby required them to pay that, their first of exchange, to the order of the plaintiffs, a certain sum of foreign money, to wit, 22,520 francs, 60 centimes, at five days after date, &c.; and that the defendants delivered the said bill to certain persons carrying on business in London under the firm of Coates & Co., to wit, to one Ezra Jenks Coates and one John Hilliard, who then delivered the same to the plaintiffs, &c., — averring presentment to the drawees, non-payment, protest, &c.

There was a second count, in the same form, on another foreign bill.

The defendants pleaded: thirdly, that they made the bill in the first count mentioned, and delivered the same to the said persons in that behalf in the first count mentioned, for the use of the plaintiffs, "on the faith and terms of being paid the price and value thereof,

[1] 4 M. & W. 9.

[2] The case of Baker v. Walker being cited in Ford v. Beech, 11 Q. B. 854, Parke, B., reaffirming his opinion that a note resembled a specialty, said: "It wants no consideration. If I give a promissory note to A for the debt of B, no consideration is necessary: it is payment. You do not want consideration in that case, as you do in the case of an agreement." — Ed.

[3] All that is material to an understanding of the case being contained in this judgment, the rest of the case has been omitted. — Ed.

amounting to a large sum of money, to wit, £876 12*s.*, according to the usage and custom of merchants in that behalf, that is to say, on the foreign post day which would be next after such delivery;" but that, although that day had elapsed long before the commencement of this suit, neither the plaintiffs nor any other person, either then or at any time before or since, paid to the defendants the said price or value of the said bill, or any part thereof, and the defendants never had or received any value or consideration whatever for the making or delivery of the bill; and that the plaintiffs had always held and did now hold the same, without any value or consideration whatever to the defendants for the same.

The plaintiff replied that, after the bill in the first count mentioned was so made and delivered by the defendants to Coates & Co., and before the bill became due, and before the commencement of this suit, the said last-mentioned persons, who then appeared to be, and whom the plaintiffs then believed to be, the lawful holders of the said bill, and entitled thereto, delivered the said bill to the plaintiffs, for a good, sufficient, and valuable consideration, to wit, to the amount of the said bill; and the plaintiffs then received the same for such good, sufficient, and valuable consideration, and without notice of the premises in the third plea mentioned.

Special demurrer, assigning for causes that either the replication was an argumentative traverse of the allegations of the third plea, being in effect an averment that there was a sufficient and valuable consideration for the bill as between the plaintiffs as payees and the defendants as makers, or it set up, by way of answer to the plea, a consideration between the plaintiffs and third persons, not parties to the bill, nor agents of, or connected in interest with, the defendants; and that the plaintiffs and defendants being immediate parties to the contract, as appears upon the face of the bill, and it being admitted by the replication that there was no consideration in fact moving from the plaintiffs to the defendants, the supposed promise of the defendants was *nudum pactum*.

The plaintiffs having joined in demurrer, the case was argued before us[1] at the latter end of last Easter term.

In support of the demurrer, the cases of Puget de Bras *v.* Forbes,[2] Jefferies *v.* Austin,[3] and Esdaile *v.* La Nauze,[4] were cited.

On the other hand, it was argued that none of those cases were applicable. And we are of that opinion.

In the first, the bill was given to an agent for the payee, who was therefore responsible for the non-payment of the value to the drawer

[1] Wilde, C. J., Coltman, Cresswell, and V. Williams, JJ.
[2] 1 Esp. N. P. C. 117. [3] 1 Stra. 674. [4] 1 Y. & C. 394.

The second was a mere case of a note given upon a consideration which failed, and was sued upon by the party to whom it was so given. And, in the third, the plaintiff had to make title by indorsement of the payee. A forged indorsement in his name was held, of course, to give no title. A good indorsement was afterwards made; but that was after the bill had become due, and therefore the holder, by virtue of that indorsement, was liable to all equities attaching upon the bill.

Having disposed of those authorities, the counsel for the plaintiffs argued that, in the present case, Coates & Co. were not, and were not alleged to be agents for the plaintiffs; and that the defendants, by placing the bill in the hands of Coates & Co., enabled them to confer upon the plaintiffs, by delivery of the bill, a title to sue upon it without showing any consideration moving from themselves to the drawers; but that, if the plea should be held to furnish any defence to the action, it was answered by the replication; and Arbouin *v.* Anderson[1] was cited as an authority.

We are of opinion that, upon this record, the plaintiffs are entitled to recover. The declaration avers a delivery by the drawers to Coates & Co., and by Coates & Co. to the plaintiffs, the payees. The plea does not allege that Coates & Co. were agents for the plaintiffs, or that the bill was delivered to them in that character. It alleges that the bill was delivered to Coates & Co. for the use of the plaintiffs, to whom, therefore, Coates & Co. might lawfully deliver it. But it goes on to say that it was so delivered upon the faith and terms of being paid the price and value on or before a certain day. It does not aver that the bill was not to be delivered to the plaintiffs until those terms had been fulfilled, or that they were ever to be fulfilled by the plaintiffs, or that the plaintiffs had notice that such terms were to be fulfilled by Coates & Co., or that Coates & Co. had not given value for the bill; nor is it alleged that the bill was delivered to the plaintiffs before the expiration of the time within which the defendants say the price of the bill was to be paid. So that, even if it be assumed that the plaintiffs knew that Coates & Co. would have till the next foreign post day to pay the price of the bill, they would have a right to conclude, from the bill's remaining in their hands after that day, that the price had been duly paid. On the other hand, if they received the bill from Coates & Co. before the next foreign post day, they would know that the drawers gave credit to Coates & Co. for the money, by placing the bill in their hands and under their control in the mean time. Nor is it alleged that the plaintiffs took the bill with-

[1] 1 Q. B. 498; 1 Gale & D. 403.

out giving value for it. The negative is confined to value passing from the plaintiffs to the defendants.

Now the writers upon foreign bills contemplate the existence of four parties: the giver of value, or purchaser of the bill, or remitter, as he is often called; the drawer; the party to whom the bill is to be paid abroad; and the drawee. The ordinary course of dealing with reference to foreign bills, as described by them, begins by the sale of the bill by the drawer to some person other than the payee: it therefore does not contemplate that the consideration for the bill should necessarily move from the payee to the drawer, or that no person but the drawer should have a right to confer a title to the bill upon the payee. See Beawes's Lex Mercatoria, Bills of Exchange, par. 6, p. 416, citing Marius, p. 22. And in par. 14, p. 418, he says: "In case of a remitter's failing before he has paid the value, and the person on whom the bill is drawn gets advice of this occurrence before acceptance, and therefore refuses to accept it, the bill, on its returning protested, shall be paid notwithstanding, with all charges, by the drawer, under proof by the possessor that he negotiated the said bill, and paid a just value for it." According to that rule, the plaintiffs would in this case be entitled to recover; for the plea does not deny that they gave a just value for the bill. Again, in par. 15, Beawes states the law to be that, where the drawer gives credit to the remitter, without advising his principal thereof, if the remitter does not pay the money, the drawer shall suffer the loss.

Here it is not shown by the plea that the bill was handed to the plaintiffs before the next post day, — and, for the reasons above given, it seems to be immaterial whether it was handed over before or after that day, — nor that the drawers ever gave notice to the payees that the price had not been duly paid. They may therefore be considered to have given credit to the remitter.

It appears to us, then, that on this declaration and plea it must be taken that Coates & Co. were the purchasers of the bill in question; and that the drawers placed it in their hands with a controlling power over it, giving them credit for a certain time for the purchase-money; and that they delivered it to the payees, who received it *bona fide*, and for value; for no fraud is alleged, and value as between Coates & Co. and the plaintiffs is not denied.

Under such circumstances, we are of opinion that the plaintiffs acquired a good title to the bill, and may sue the drawers upon it, although they have never received value for it. Suppose the bill had been given to Coates & Co. for their accommodation, or a promissory note had been given to them, made payable to the plaintiffs, in order that they, Coates & Co., might borrow money upon it, or hand it over

to the payees, in discharge of a debt: surely, the payees, in either case, might sue upon the instrument, without proving the giving of value to the drawer or maker. The want of such value could not be relied upon as an answer to the action, on the ground of the contract between the immediate parties to the instrument being *nudum pactum*.

For these reasons, we are of opinion that the plea does not give a sufficient answer to the declaration; and, even supposing the plea to be sufficient to call upon the plaintiffs to show that they took the bill *bona fide*, and for value, we think that they have done so by their replication. Our judgment on this demurrer must therefore be for the plaintiffs. *Judgment for the plaintiffs.*[1]

CROFTS v. WILLIAM BEALE.

IN THE COMMON PLEAS, JUNE 3, 1851.

[*Reported in* 20 *Law Journal Reports, Common Pleas*, 186.[2]]

ASSUMPSIT on a promissory note made by the defendant, payable to the plaintiff on demand, for £400, with interest at five per cent per annum.

Plea: that the note was made by the defendant, at the request of the plaintiff, as a collateral security for a debt of £1,000, due from one John Beale to the plaintiff; and that the defendant was not, at the time of making the note, or ever, liable to pay the said debt, or to give the note as a collateral security for the same; and that there never was any other value or consideration for the giving or making of the said note, save as aforesaid.

The plaintiff replied *de injuria*.

At the trial before Williams, J., at the first sitting for Middlesex in this term, to prove the plea, the defendant called John Beale, who stated that he was indebted to the plaintiff in the sum of £1,000, and that, being pressed for payment, and a writ having issued against him at the suit of the plaintiff, he and the defendant gave the plaintiff their joint and several note, being the note declared on.

The learned judge told the jury that, if the note was given to pre-

[1] Robinson v. Reynolds, 2 Q. B. 196; South Boston Iron Co. v. Brown, 63 Me. 179; Glascock v. Rand, 14 Mo. 550, *accord*.

Conf. Nelson v. Cowing, 6 Hill, 336. — ED.

[2] 11 C. B. 172, s. c. — ED.

vent legal proceedings against John Beale, there was a sufficient consideration for it. The jury, however, returned a verdict for the defendant.

W. H. Watson now moved for a new trial, on the ground that the verdict was against evidence, or for judgment *non obstante veredicto*, on the ground that the plea, if proved, was no answer to the action. There was no evidence to show that the note was given at the instance of the plaintiff. [CRESSWELL, J. Is a pre-existing debt of a third person a good consideration for the giving of a bill or note, without any agreement for forbearance?] There was pressure: a writ had issued. [JERVIS, C. J. The note was payable on demand.] The note was given as a collateral security for a debt: that might have been in consideration of a former agreement. [JERVIS, C. J. We cannot assume that there was any consideration other than that stated in the plea. In Byles on Bills (6th ed. p. 96, note *p*), it is said that, "if a note be payable immediately, it is conceived that the pre-existing debt of a stranger would not be a consideration, unless credit had been given to the original debtor at the maker's request."] In Childs *v.* Monins, it was held that a promissory note, by which the makers, as executors, jointly and severally promised to pay on demand, with interest, rendered them personally liable. And Dallas, C. J., said: "If they meant to limit their liability, why did they not add to the words 'as executors' the words 'out of the estate of Thomas Taylor'? But they promise absolutely, and further add an engagement to pay interest: when, therefore, by the engagement to pay interest, they have induced the plaintiff to suspend his clear and admitted demand, by so doing, they make the promise personal and individual." [MAULE, J. You say that the taking of the note necessarily imports that some time must be given.] Yes. In Sison *v.* Kidman, a plea almost in terms the same as this was held to disclose a good consideration. [MAULE, J. There the plea was that the defendant never had any value or consideration for the note. It admits that there was a consideration, but alleges that the defendant had none. JERVIS, C. J. The language of the plea is somewhat differently and evidently more correctly stated in the report in the Law Journal than in the other books.] In Popplewell *v.* Wilson, a note to pay for the debt of another was held to be a good note within the statute 3 Anne, c. 9. Why should not a man bind himself by a promissory note to pay the debt of a third person? [JERVIS, C. J. No doubt; but I think this is a sufficient plea of no consideration. There is no ground for a rule for judgment *non obstante veredicto*. As to the other point, we will confer with my brother Williams.]

It was afterwards intimated by the court that the rule might go for a new trial.

Bramwell and *Willes* showed cause. The case was properly left to the jury, and they were warranted in finding as they did There clearly was no consideration at the time the note was given. In 1 Wms. Saund. 210 *c*, note (c), it is said that, "in all cases of forbearance to sue, such forbearance must be either absolute, Mapes *v.* Sidney,[1] or for a definite time, Fisher *v.* Richardson,[2] or for a reasonable time, Johnson *v.* Whitchcott:[3] forbearance for a little,[4] or for some time,[5] is not sufficient." There clearly is no consideration for payment immediately, and no agreement to forbear for any time. See Payne *v.* Wilson.[6]

W. H. Watson and *Selfe*, in support of the rule, submitted that the fact of proceedings having already been commenced against John Beale proved that there must have been some forbearance, and dispensed with the necessity of showing a contract to forbear for any definite time. They also relied upon the fact of the note providing for the payment of interest, and referred to Lord Chief Justice Dallas's judgment in Child *v.* Monins.

JERVIS, C. J. I see no ground for disturbing this verdict. The jury have in effect found that the collateral security was the only consideration. When the jury, as men of business, looked at the written contract, they naturally and very properly concluded that it expressed all that the parties meant to agree. I cannot say that they have come to a wrong conclusion.

MAULE, J. It was a case for the jury; and I am far from thinking that they have done wrong.

CRESSWELL, J., concurred.

TALFOURD, J. I also think the jury came to a correct result in this case. The fallacy on the part of the plaintiff is in confounding a hope or expectation of forbearance with a consideration to forbear.

Rule discharged.[7]

[1] Cro. Jac. 683. [2] Cro. Jac. 47. [3] 1 Roll. Abr. 24, pl. 33.
[4] 1 Roll. Abr. 23, pl. 25. [5] 1 Roll. Abr. 23, pl. 26.
[6] 7 B. & C. 423; 1 M. & R. 708.
[7] Colburn *v.* Tolles, 14 Conn. 341, *accord*.
Coombs *v.* Ingram, 4 D. & Ry. 211, *contra*.
See Gates *v.* Hackethal, 57 Ill. 534; Mecorney *v.* Stanley, 8 Cush. 85. — Ed.

LATOUCHE v. LATOUCHE.

IN THE EXCHEQUER, JANUARY 23, FEBRUARY 10, 1865.

[*Reported in* 34 *Law Journal Reports, Exchequer*, 85.]

CHANNELL, B. (Feb. 10), delivered the judgment of the court.[1] This was a special case stated without pleadings for the opinion of the court, and was argued before us in the course of the present term.

The question is whether the defendant is liable on a promissory note for £917 11*s.* dated the 28th of August, 1856, payable to the plaintiffs or order.

The facts, as they may be extracted from the case agreed upon, may be shortly stated. The plaintiffs are bankers at Dublin; and they had for many years prior to 1837 and down to the time of his death a banking account with Mr. George Latouche, with whom the defendant Amelia Latouche intermarried in the year 1831. On the occasion of the marriage, property was settled in the usual way, to the defendant's separate use. On the 25th of November, 1855, the defendant's husband died. After his death, she gave the note now sued upon. The circumstances which preceded the giving this note which are material to be noticed are the following. In 1837, her husband's account being then overdrawn, the plaintiffs, being aware that she had separate estate, agreed that her husband should have permission to overdraw his account to the extent of £950, for a period of two years, the plaintiffs retaining certain securities then in their hands, and having by way of further security a joint promissory note of the defendant's husband and herself for £950. The defendant's husband and herself gave a joint promissory note for that amount.

In 1840, a new arrangement was come to, substantially the same as the former. A new joint promissory note was given, dated the 1st of August, 1840, for the sum of £950. In 1848, an arrangement was come to, and a third joint promissory note, namely, one for the sum of £1,000, dated the 1st of January, 1848, was given by the defendant's husband and herself. The terms of this arrangement are not distinctly stated in the case. It is, however, clear that the note was given as a security to the bank for the overdrawn account of George Latouche. It is not, however, at all clear, with respect to this note, whether there was any limitation of time during which the arrangement was to be enforced, as on the previous occasions. In 1855, the husband died. At that time, there was a bal-

[1] Pollock, C. B., Martin, Channell, and Pigot, BB.

ance of £2,340 16*s.* 4*d.* due from him to the bank. This was reduced by securities, which have been realized, namely, assignment of a policy and of a legacy, to £917 11*s.* The bank then applied to the defendant by a letter, in which they state that this last-mentioned balance "is uncovered by any security, an application for your and Mr. Latouche's joint note for the same having been postponed on account of his illness." The defendant, in reply, expresses her regret that she is unable to pay this amount, and ultimately signs the note on which this action is brought. The question we have to decide is whether she is liable upon this note, and we think she is.

We do not adopt the argument of the plaintiffs' counsel, that the words "for value on account of the late George Latouche" in the note precludes the defendant from showing there was no consideration for her making it. But, as the note *prima facie* imports a consideration, the onus of proof lies upon the defendant to show that there was no consideration for this note, which was made at a time when she was not under coverture. We do not think that the facts stated in this case show there was no consideration. The note of 1848 although made during coverture, was binding on the defendant's separate estate. Unless something occurred to discharge the defendant's separate estate from liability, there was, we think, a good consideration for the note now sued upon, made by her after her coverture was determined. It is not, we think, material that more than six years elapsed from 1848 to 1855; for it has been held that a debt barred by the Statute of Limitations, and as to which the remedy has gone, is still a good consideration for a promise in writing to pay. We think that the same principle applies to the present case, though the note of 1848 was signed by the defendant when covert, and only bound her separate estate in equity.

It was argued that the note must be taken to have been made subject to some agreement between the parties, either as to the time for which George Latouche was to be permitted to overdraw his account, or that it was to be a security (collateral to the assignment of the policy and legacy) for the then overdrawn account to the amount of £1,000 only, and not a security for a new credit beyond the £1,000; and if such agreement existed, then that £1,000 having been realized on the policy and assignment of the legacy, the note of 1848 was in effect satisfied, and afforded no consideration for the subsequent one. We think, however, that it does not appear upon the case stated that there was any such agreement, and it is for the defendant to show it. The only statements in the case at all tending to show such an agreement are contained in the letters of the plaintiffs of the 31st of July and the 28th of August, 1856, which are to the effect that the bal-

ance on the amount of the policy and legacy is uncovered by any security. This, however, when taken with the next sentence, "an application for your and Mr. Latouche's joint note for the same having been postponed on account of his illness," seems to refer to the fact that the six years had expired since the note of 1848, rather than to admit that that note would not have been during the six years a security for such a balance on the ground of any agreement subject to which it was given. Our judgment will therefore be for the plaintiffs. *Judgment for the plaintiffs.*[1]

HEWITT *v.* KAYE.

IN CHANCERY, BEFORE LORD ROMILLY, M. R., JUNE 8, 1868.

[*Reported in Law Reports, 6 Equity,* 198.]

THIS was a special case.

Elizabeth Harrison, in 1860, founded a charity called St. Scholastica's Retreat, and in 1861 she founded a charity called St. John's Hospice. By her will, made in September, 1866, she gave all her residuary pure personalty to the trustees of St. Scholastica's Retreat. On the 15th of October, being on her death-bed, and in contemplation of her death, she expressed a desire to alter the deed of settlement of St. John's Hospice, and to vest £600 in the trustees of St. John's Hospice upon the trusts of the deed as amended; and accordingly she instructed her solicitor to prepare a deed altering the settlement, and a codicil giving the £600, but she died before either of these documents could be prepared. In the mean time, believing that she would not have time to execute the deed and codicil, she signed and gave to one of the trustees of St. John's Hospice a check on her bankers for £600; but she died before it was possible to present the check.

The question in the special case, in which the trustees of St. John's Hospice were the plaintiffs, and the executors and the trustees of St. Scholastica's Retreat were the defendants, was whether the trustees of St. John's Hospice were entitled to receive the sum of £600, the amount of the check, out of the testatrix's assets, by way of *donatio mortis causa*, or otherwise.

Mr. Bagshawe, for the plaintiffs. The gift of the check was a good *donatio mortis causa* of the £600. The gift was made with a view to the donor's death, and on condition of her death by her then illness;

[1] Burkitt *v.* Ransom, 2 Coll. 395, *accord.*
Thomas *v.* Passage, 54 Ind. 106, *contra.* — ED.

and there was a sufficient delivery. It is not necessary that the complete property in the thing given should pass by the delivery, but that the property should so far pass as to give the donee a title to the assistance of a court of equity to make the donation complete. Thus, the delivery of a bond, a promissory note, a mortgage deed, or a policy of assurance, is a good *donatio mortis causa*, because the donor has done all that he can do to pass the property; and, although the possession of the instrument does not enable the donee to recover the *chose in action*, the court compels the executor to allow his name to be used for the purpose of giving effect to the gift. In Lawson *v.* Lawson,[1] where a husband on his death-bed drew a bill upon a goldsmith, which is the same thing as a check on a banker, to pay £100 to his wife to buy her mourning, it was held a good gift. In Tate *v.* Hilbert,[2] the check was given without reference to the donor's death. In Bouts *v.* Ellis,[3] the gift of a check, which was afterwards by the donor's direction exchanged for the check of a stranger, was held valid, although the stranger's check was not paid till after the donor's death. In Witt *v.* Amis[4] and Amis *v.* Witt,[5] the delivery of a banker's deposit note was held a good gift *mortis causa* of the money deposited. Here the testatrix, by giving the check, has done all in her power to complete the gift. [He also cited Drury *v.* Smith.[6]]

Mr. Speed, for the defendants, was not called upon.

Lord Romilly, M. R. I am of opinion, both upon principle and upon authority, that this is not a valid *donatio mortis causa*. When a man on his death-bed gives to another an instrument, such as a bond, or promissory note, or an I O U, he gives a *chose in action*; and the delivery of the instrument confers upon the donee all the rights to the *chose in action* arising out of the instrument. That is the principle upon which Amis *v.* Witt[5] was decided, where the donor gave the donee a document, by which the bankers acknowledged that they held so much money belonging to the donor at his disposal, and it was held that the delivery of that document conferred upon the donee the right to receive the money. But a check is nothing more than an order to obtain a certain sum of money; and it makes no difference whether the money is at a banker's or anywhere else. It is an order to deliver the money; and, if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. The testatrix gave this check at night; and she died in the course of the same night before it could be presented. Suppose she had said, "I have got £600 in my desk: bring it to me, and I will give you the money," and had died before it was

[1] 1 P. Wms. 441.
[2] 2 Ves. 111.
[3] 17 Beav. 121; 4 D. M. & G. 249.
[4] 1 B. & S. 109.
[5] 33 Beav. 619.
[6] 1 P. Wms. 404.

brought to her, that would have been no gift; and the gift of a check is the same thing: it is worth nothing until acted upon; and the authority to act upon it is withdrawn by the donor's death. All the authorities decide that there must be complete delivery: the only case at all tending the other way is Lawson v. Lawson;[1] but that has been explained by Lord Loughborough on the principle that the drawing of the bill was in the nature of an appointment. The question must be answered in the negative.[2]

BROMLEY v. BRUNTON.

IN CHANCERY, BEFORE SIR JOHN STUART, V. C., JUNE 23, 24, 1868.

[*Reported in Law Reports, 6 Equity, 275.*]

THE bill in this cause was filed for the administration of the trusts of the will of Hannah Mary Ann Chantry; and, under the decree, the chief clerk certified that Mary Ann Bromley, who was not a party to the suit, claimed a sum of £200 to be due to her from the estate of the testatrix, with interest at £4 per cent from the date of the decree, and that the evidence in support of the claim was that, on the 14th of February, 1867, the testatrix gave M. A. Bromley, by way of gift, a check for £200, signed by her on her bankers, the London and County Bank, Oxford Street branch, payable to M. Bromley or bearer; that, on the 15th of the same month, the check was presented for payment, but was refused, on the ground that the signature differed from the usual signature of the testatrix; that, on the 15th, £170 was paid in to the account of the testatrix, whereby there were sufficient assets for the payment of the check; that, on the 16th, the check was again presented at the bank, and was again refused for the reason above alleged; and that the testatrix died on the 17th of the same month without the check having been paid. It was submitted to the court whether the claim should be allowed. The evidence showed that the claimant was a grand-daughter, who had resided with the testatrix for about three years previously and up to the time of her death, and had attended

[1] 1 P. Wms. 441.

[2] *In re* Beak's Estate, L. R. 13 Eq. 489; Dunne v. Boyd, Ir. R. 8 Eq. 609; Second Nat. Bank v. Williams, 13 Mich. 282 (*semble*); Harris v. Clark, 3 Comst. 93; Curry v. Powers, 70 N. Y. 212 (*semble*); Simmons v. Savings Society, 31 Oh. St. 457 (*semble*), *accord*.

See M'Kenzie v. Downing, 25 Ga. 669.

Conf. Lawson v. Lawson, 1 P. Wms. 441; Craig v. Craig, 3 Barb. Ch. 76. — ED.

upon her personally during her last illness; that the testatrix was perfectly conscious of what she was doing when she signed the check, the body of which was written by the claimant; that she told the claimant it was a gift; that there was just money enough in the bank to cover the check; and that the testatrix, when she handed the check to the claimant, said she thought it would be useful to her, and, should any thing happen to her (the testatrix), she would be able to do something with the money, and not be compelled to go home, where she knew the presence of a married sister of the claimant was not agreeable to her, and interfered with her comfort.

The check was signed "Hannah Chant;" but, "Chant" being written very badly, the testatrix wrote "Chantry" underneath; and hence the refusal on the part of the bank to pay the money.

The evidence of the claimant was confirmed by the affidavits of several deponents.

Mr. Greene, Q. C., and *Mr. Renshaw*, for the plaintiffs.

Mr. Fischer, for the defendants, the executors.

Mr. Bagshawe, for M. A. Bromley, submitted that every thing was done by the testatrix and by the donee of the check to make this a good gift *inter vivos*. The check was presented in due time at the bank, where there were sufficient funds, and it ought to have been cashed. The claimant ought not to suffer through a neglect of duty or wrongful act on the part of the bankers.

Mr. Everitt, for residuary legatees, infants, contended that there was no perfect gift *inter vivos*. It was a voluntary gift, which could not have been enforced against the testatrix if she were living; and, being incomplete, it could not now be enforced against her executors. Edwards *v.* Jones.[1]

The gift could not be considered as a *donatio mortis causa;* nor could it be supported as a declaration of trust. Jones *v.* Lock,[2] Coningham *v.* Plunkett.[3]

[The VICE-CHANCELLOR referred to Kiddill *v.* Farnell,[4] and Mr. Hallett, as *amicus curiæ*, to Cross *v.* Sprigg.[5]]

There was not a complete legal obligation. The claimant could not have successfully sued the executors at law; and a court of equity ought not to afford any relief.

[The following authorities were also cited: Foley *v.* Hill,[6] Tate *v.* Hilbert,[7] Fletcher *v.* Fletcher,[8] Bridge *v.* Bridge,[9] Beech *v.* Keep,[10] Tate *v.* Leithead,[11] Hewitt *v.* Kaye, Bouts *v.* Ellis,[12] Woodford *v.* Charn-

[1] My. & Cr. 226. [2] Law Rep. 1 Ch. 25. [3] 2 Y. & C. Ch. 245.
[4] 3 Sm. & Giff. 428. [5] 6 Hare, 552. [6] 2 H. L. C. 28.
[7] 2 Ves. 111. [8] 4 Hare, 67. [9] 16 Beav. 315.
[10] 18 Beav. 285. [11] Kay, 658. [12] 17 Beav. 121; 4 D. M & G. 249.

ley,[1] Lawson v. Lawson,[2] *Ex parte* Pye;[3] Byles on Bills, 9th ed. p. 20, and Williams on Executors, 5th ed. p. 1603.]

Sir John Stuart, V. C. In order to make a gift of this description valid, it is necessary, according to the settled doctrine of the court, that it should be complete, that every thing should be done on the part of the donor. The gift in this case being made in the form of a check drawn on the bankers of the donor, if there had been no funds in the hands of the bankers, then of course there would have been an incompleteness in the gift on the part of the donor. It is clear, however that when the check was presented on the second occasion the bankers had sufficient funds in their hands to pay it. The reason why they did not pay it was one proceeding from their minds: they doubted the authenticity of the donor's signature; and the result is that the funds which the donor had dedicated to the purpose of this gift, through no act of the donor, and through no default of the donee, came into the hands of the executors of the donor. I conceive that, under these circumstances, no further act was necessary on the part of the donor to make the gift complete. The failure, so far as the gift has failed through non-payment to this time, occurred through the default of third parties, whose duty it was to pay it. The effect of the check was to appropriate so much of the donor's money; and my opinion is that the funds, the subject of the gift, are in the hands of the executors just as much liable to the payment of the check as they were in the hands of the bankers. It was said that Tate v. Leithead is an authority in favor of the executors refusing to pay this check; but in that case the check was never presented to the bankers, while here the check was presented on two occasions, and the failure in the receipt of the money by the donee is not attributable to her, but to the conduct of the bankers. I am of opinion that the gift was as complete as the donor and the donee could make it, and consequently that the check must be paid out of the funds in the hands of the executors, with interest, as claimed.

[1] 28 Beav. 96. [2] 1 P. Wms. 441. [3] 18 Ves. 140.

ROLLS v. PEARCE.

In the High Court of Justice, Chancery Division, before Sir Richard Malins, V. C., April 20, 1877.

[*Reported in* 5 *Chancery Division*, 730.]

This was a special case stated for the opinion of the Chancery Division of the high court of justice under the Act of 13 & 14 Vict. c. 35.

The plaintiffs were the trustees and executors of the will of Richard Lano Pearce, dated the 8th of November, 1870; and the defendant was his widow, who took certain benefits under the will, subject to which the beneficiaries were the testator's two infant children.

On the 18th of October, 1871, the testator left England with his wife, the defendant, and resided at San Remo in Italy, where they remained till his death, which happened on the 7th of February, 1872.

On the 5th of December, 1871, the testator became seriously ill; and a doctor who was called in pronounced the disease a fatal one, and gave it as his opinion that he would not live many hours. But in the course of the day he rallied slightly, and called for pen, ink, and paper, and his check-book. The defendant, Mrs. Pearce, fearing that the act of writing would fatigue and excite him, remonstrated with him; but nevertheless he filled up and signed a check on his London bankers for £100, which ran as follows:—

"34 Old Bond Street, London.
"5th December, 1871.
"The City Bank, Bond Street Branch.
order
"Pay Mrs. Pearce or bearer (*sic*) one hundred pounds.
"£100 0 0. R. Lano Pearce."

When the testator had filled up and signed this check, he tore it from the counterfoil and handed it to Mrs. Pearce, and he afterwards wrote some letters.

Early in the morning of the 2d of February, 1872, the testator, who was then very weak, was visited by two friends. During the visit, he asked for his check-book, and said that he wished to give his wife a check, and also desired to make a codicil to his will. One of the friends accordingly, at the request of the testator, filled up a check

for £250 in a form exactly similar to that of the £100 check previously given. The same friend also wrote out on a piece of paper the following:—

"Codicil to my will. I freely give to my dear wife all my property in San Remo."

The check and codicil were then signed by the testator, and the codicil duly attested by the two friends.

The testator never recovered from his illness, and died on the 7th of February, 1872.

During the testator's lifetime, Mrs. Pearce indorsed the checks to "Messrs. Asquasciati Frères" (who were bankers at San Remo) "or order," and then paid them into Messrs. Asquasciati Frères' bank. The checks were subsequently indorsed by them to other persons, and negotiated in the ordinary course of business; and Mrs. Pearce drew upon Messrs. Asquasciati Frères against the checks, and, it was said, paid debts of her husband out of the proceeds.

On the 13th of February, 1872, the check for £250 came into the possession of the Union Bank of London, and was presented by them for payment at the City Bank; and, on the 15th of February, the £100 check came into the possession of Messrs. Barclay & Co., and was by them also presented for payment at the City Bank.

The City Bank, however, refused payment of both the checks, on the ground that as the testator (who was the drawer) had died on the 7th of the same month, they had no authority to make the payments. In consequence of this, the defendant was obliged to refund what she had received upon the checks.

The question was whether the gift of the checks and their subsequent negotiation by the defendant during the testator's lifetime constituted a good *donatio mortis causa*, so as to entitle the defendant, as the holder of them, to payment as against the plaintiffs out of the testator's estate, notwithstanding the death of the testator before they were presented for payment.

Glasse, Q. C., and *Hollis*, for the plaintiffs.

The executors do not desire to argue the point adversely to the widow. They only wish to see that the case is fairly presented.

Checks are not in general good *donationes mortis causa*, Williams on Executors, 7th ed. p. 779; and it is for Mrs. Pearce to make out that sufficient was done here to constitute what would be upon the authorities a good *donatio mortis causa*.

Locock Webb, Q. C., and *Alfred Bailey*, for Mrs. Pearce.

Though there is no case precisely in point upon this question, it is in principle covered by the authorities. The donor had made a complete

gift, and the donee had done all that was necessary to make the acceptance complete.

A check does not differ in substance from a goldsmith's bill, which in Lawson *v.* Lawson [1] was held to be, especially to a wife, a good gift *mortis causa;* and Miller *v.* Miller,[2] so far as it supports a contrary view, must be treated as having been overruled by Tate *v.* Hilbert,[3] in which, though it establishes the rule that a note given shortly before the death of the donor, which the donee takes no steps to present or make use of in his lifetime, is not a good *donatio mortis causa*, it is expressly laid down that where the note has been paid away for value, or applied in payment of a debt of the donee in the donor's lifetime, as has been done in the present case, there is a complete gift. In Duffield *v.* Elwes [4] also, the test is stated to be whether the gift, as far as the donor was concerned, was completed. In Rankin *v.* Weguelin, a gift of bills of exchange to the donor's wife was supported as a *donatio mortis causa;* and, in Boutts *v.* Ellis,[5] the same reasoning was applied to the gift of a check to the testator's wife. Rankin *v.* Weguelin was also treated as the governing authority in Veal *v.* Veal.[6] It is true that in Hewitt *v.* Kaye a check was held not to be a good *donatio mortis causa*, but that was intended as a gift to a charity, and not only was the check not presented, but there was no time to present it, the testatrix having died the same night on which it was given. In Bromley *v.* Brunton, where, as here, the donee had taken every possible step to perfect the gift, it was held to be good.

Glasse pointed out a discrepancy between the reports of the judgment in Tate *v.* Hilbert;[7] the report in Brown's Chancery Cases seeming to make the application of a check in payment of a debt to be insufficient to complete a gift *mortis causa*, unless the check was itself paid away in the testator's lifetime.

MALINS, V. C., after referring to the facts, continued: —

The law seems to be in a very curious state. The result of the authorities appears to be that a gift of a bill of exchange, which is by its very nature payable at a future day, may be a good *donatio mortis causa;* but the gift of a check is not valid, unless it is presented for payment or paid before the death of the donor. I am satisfied that the object of this testator was to give these checks to his wife. Therefore, I think I ought to do all I can to make the gift good.

Now I can really see no reason why, if a bill drawn on a goldsmith would be a good *donatio mortis causa*, a check should not be so too.

[1] 1 P. Wms. 441.
[2] 3 P. Wms. 356.
[3] 2 Ves. 111; 4 Bro. C. C. 286.
[4] 1 Bli. (N. S.) 497.
[5] 4 D. M. & G. 249.
[6] 27 Beav. 303.
[7] 2 Ves. 111; 4 Bro. C. C. 286.

A distinction has, however, been drawn between the case of a bill of exchange and that of a check payable to bearer; and if these checks had been made payable to bearer, and had not been presented for payment at the bank on which they were drawn before the donor's death, I should probably have considered that I was bound to hold that there was not a good gift.

But these are checks payable to order; and it is clear that the testator knew that they could not be presented for payment either on the day they were drawn or the subsequent day. I must attribute to him the knowledge that the check would not be paid for some time, and on that ground I come to the conclusion that this case differs from the other cases of checks. But I have also the decision of Lord Loughborough in Tate *v.* Hilbert.[1] He there says:[2] "If she had paid this away either for valuable consideration or in discharging a debt of her own, it would have been good; or even if she had received it immediately after the death of the testator, before the banker was apprised of it, I am inclined to think no court would have taken it from her."

In this case, I have the very distinction thus pointed out by Lord Loughborough. Mrs. Pearce did pay away the proceeds of the check, and, it would seem, amongst the husband's creditors. And I think that, when a man gives his wife a check, it is in substance as complete a gift as if he handed her the cash. It is, however, said that in the report of Tate *v.* Hilbert in Brown's Chancery Cases an additional circumstance is mentioned in the judgment, and Lord Loughborough is made to say:[3] "If the note had been paid away for valuable consideration, and the money received at the bankers before notice of the death of the party, or immediately after, it might have availed." If there is any real discrepancy, I think that the report in Vesey is probably the more accurate, and that it was intended to be held that an actual dealing for value with a note would complete the gift as a valid *donatio mortis causa.*

I consider, therefore, that Mrs. Pearce has made out a good title to the proceeds of the checks, and I will answer the first question in the case in the affirmative.[4]

[1] 2 Ves. 111. [2] 2 Ves. 118. [3] 4 Bro. C. C 291.

[4] See Tate *v.* Hilbert, 2 Ves. Jr. 111; 4 Bro. C. C. 286, s. c. — Ed.

KENT, Receiver of the Franklin Bank, v. WALTON.

In the Supreme Court of Judicature, New York, May, 1831

[*Reported in 7 Wendell, 256.*]

This was an action of assumpsit, tried at the New York circuit in December, 1829, before the Hon. Ogden Edwards, one of the circuit judges.

The suit was by the second indorsee of a promissory note against the maker. The note was for $650, payable to the order of H. Kennedy, indorsed by him to T. Ash, and by Ash to the Franklin Bank. It was given in renewal of a previous note for $1200, upon which, when it fell due, $550 were paid. The first note was indorsed by Kennedy to Ash, who cashed the same, charging a discount of from 1¼ to 1½ per cent per month, and had the note discounted by the Franklin Bank, and the amount passed to his credit. The payment made on the original note was made to the Franklin Bank, and the note for the balance was taken by the bank in renewal, at the request of Ash. There was no usury in the second note; and it was not known to the officers of the bank at the time of discounting the first note, or at any time subsequently, that the same had been discounted at a usurious rate of interest. The deposition of Ash was read in evidence. In it he testified that when he discounted the first note, and previous to Kennedy indorsing it, Kennedy told him that it was lent to him by the maker without consideration; and he further testified that Kennedy was dead. This part of the deposition relating to the declarations of Kennedy was objected to as incompetent evidence, and so ruled by the judge, who charged the jury that there was no legal evidence of an agreement to discount the note at a usurious rate of interest; but, if the declarations of Kennedy were admitted as evidence, the plaintiff was still entitled to a verdict, on the ground that the Franklin Bank was an innocent holder for valuable consideration, and without notice of usury in the first note; the note on which the action was brought being a new security given to a *bona fide* assignee, who had paid a valuable consideration for the usurious note without notice of the usury. The defendant excepted to the charge, and the jury found for the plaintiff. The defendant now moved for a new trial.

G. W. Morris, for defendant.

W. Kent and *S. A. Foot*, for plaintiff.

By the Court, Savage, C. J. The judge was correct in both points decided by him. To make out the defence of usury, it was

necessary to show that the note was not a valid instrument when discounted by the witness, Ash. The presumption is in favor of the validity of a promissory note: it implies a sufficient consideration. It is well settled that discounting a business note at more than seven per cent interest is not usury; a note valid in its inception may be bought and sold as a chattel, at its value, real or supposed; but, if it is an accommodation note, it is not a valid instrument until negotiated; between the original parties, it has no legal existence, and receives vitality from its first negotiation. If that be usurious, the note is void. The fact of its being accommodation paper must be proved by competent and sufficient testimony. For aught appearing in this case, the payee of the note, Kennedy, would, if living, have been a competent witness; and it is contended that what he said on the subject is proper testimony. Evidence of his declarations was objected to as hearsay: it certainly was such. The rule that what a witness who is dead has said shall not be received is subject to but few exceptions, and this certainly is not one.

The other point is also equally well settled. Even although it had been shown that the first note was tainted with usury, and therefore void in the hands of the Franklin Bank, who had paid value for it without notice of the usury, yet the giving a new security to an innocent holder for valuable consideration constitutes a new transaction, and the usury of the first note does not affect the second. In Powell *v.* Waters,[1] Chancellor Jones, speaking of the proposition that a new security, taken in renewal of a prior usurious contract by a *bona fide* holder, is not avoided by the usury of the original transaction, says, "That principle applies to the case of an innocent holder of an usurious contract, for which he has given a valuable consideration without notice of the usury." Colden, senator, expresses the same sentiment at p. 696. Among the principles which he considers well settled, he says: "If an original note or security be usurious, a subsequent note or security, taken in the place of the original note or security by an innocent and *bona fide* holder thereof, ignorant of the original usury, is not usurious, unless more than at the rate of seven per cent was taken upon the new note or security." This was the doctrine asserted by the learned judge at the circuit, and is sound law.

New trial denied.[2]

[1] 8 Cowen, 681.

[2] Cameron *v.* Nall, 8 Ala 158; Powell *v.* Waters, 8 Cow. 681; Holmes *v.* Williams 10 Paige, 326, *accord.* — Ed.

JAMES HORN v. JOHN FULLER.

IN THE SUPERIOR COURT OF JUDICATURE, NEW HAMPSHIRE, JULY TERM, 1834.

[*Reported in 6 New Hampshire Reports*, 511.]

ASSUMPSIT upon a written contract as follows:—

"RUMNEY, January 18, 1822.

"Agreeably to my father's last will, I promise to pay James Horn forty dollars, when he shall arrive at the age of twenty-one years.

"JOHN FULLER.
"ASA FULLER."

The cause was tried upon the general issue at November term, 1832, when it was admitted that the defendant made the contract, and that the plaintiff arrived at the age of twenty-one years before this action was commenced.

It appeared that Asa Fuller, who also put his name to the contract, was the father of the defendant; and that he had since died seized of real estate, of which the defendant was in possession. But it did not appear that Asa Fuller left a will.

It was objected, on the part of the defendant, that the sum mentioned in the note must be considered as intended for a mere gift by Asa Fuller to the plaintiff, and that no action could be maintained upon the note for want of consideration. And a verdict was taken for the defendant, subject to the opinion of the court, upon the above case.

Bell, for the plaintiff.

Quincy, for the defendant.

The opinion of the court was delivered by

RICHARDSON, C. J. The note in this case appears on the face of it to have been given on account of Asa Fuller, and must be presumed to have been given at his request; and this is the only evidence of a consideration which exists in the case. The question is, whether this is sufficient evidence of a consideration to sustain the note.

It was once intimated by an English judge that no consideration was necessary to sustain a promise in writing. 3 Burr. 1670.

A similar intimation has also been given by an American judge 2 Caines, 247.

But it is now too well settled to be questioned that, as between the original parties to a note, a consideration is essential to its validity.

Kunn v. Hughes;[1] 3 D. & E. 421; 7 Johns. 26, 321; Peake's N. P. C. 61, 216; 7 Cowen, 322; 18 Johns. 145; 17 Johns. 301; 10 Johns. 198; 5 Pickering, 391; 6 Pickering, 427; 5 B. & C. 501; 5 Wheaton, 277; 9 Mass. 254.

But it seems always to have been held that a bill of exchange imports a consideration; and that presumption stands until the contrary appears. Chitty on Bills, 12, 13; 1 Wilson, 189; 2 Starkie's Evidence, 280.

And, since the statute of Anne, promissory notes seem to have been considered as standing on the same ground. 9 Johns. 217; 14 Johns. 245; Bayley on Bills, 24, 25.

And it is not necessary, nor is it customary, in declaring on a note, to state a consideration. Law's Pl. in Assumpsit, 261.

In this case, the note may be considered as, in effect, an order by the father upon the defendant, accepted by the latter. And this is *prima facie* evidence that the father had placed the money in the defendant's hands for the use of the plaintiff. Bayley on Bills, 245; 3 D. & E. 174; Tallock v. Harris; Vere v. Lewis.[2]

It is immaterial whether, as between Asa Fuller and the plaintiff, there was any consideration. The presumption is that the defendant has the money, and he is not at liberty to dispute the consideration between the other two. That is no concern of his. Nickerson v. Hayward.[3]

We are of opinion that there must be, in this case,

A new trial granted.

JAMES H. WOODWARD v. JONATHAN B. SEVERANCE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, NOVEMBER, 1863.

[*Reported in 7 Allen*, 340.]

CONTRACT brought by the second indorser against the first indorser of a promissory note, signed by Charles E. Rice and indorsed first by the defendant, then by the plaintiff, and afterwards by another person, all of whom, it was agreed, were accommodation indorsers, with no agreement or understanding among themselves in reference to their interest or liability, except such as would be implied by law. The note was discounted at a bank in Brighton, and before its maturity was taken up by the plaintiff, who again lodged it with the same bank for collection, and it was duly presented for payment, and payment refused, and notice given to the defendant. Upon these facts, judg-

[1] 7 D. & E. 350, note. [2] 3 D. & E. 182. [3] 19 Johns. 113.

ment was rendered for the plaintiff in the Superior Court, and the defendant appealed to this court.

J. B. Robb, for the defendant.

F. A. Brooks, for the plaintiff.

CHAPMAN, J. Where a note is indorsed by several successive indorsers for the accommodation of the maker, their rights and obligations in respect to each other are determined by the form of the contract, in the absence of any agreement between them. In the present case, there being no agreement between them, and the plaintiff having taken up the note, he can recover the amount of the defendant, who is a prior indorser. Clapp *v.* Rice,[1] Weston *v.* Chamberlin,[2] Sweet *v.* McAllister.[3] *Judgment for the plaintiff.*[4]

MARCELLA S. COURTNEY *v.* LIZZIE G. DOYLE.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, JANUARY TERM, 1865.

[*Reported in* 10 *Allen*, 122.]

CONTRACT upon the following promissory note: —

"LOWELL, May 1, 1861.

"I promise to pay Marcella Sears the sum of three hundred dollars with interest from date.

(Signed) "MARY A. DOYLE.
"LIZZIE G. DOYLE."

[1] 18 Gray, 408. [2] 7 Cush. 404. [3] 4 Allen, 854.

[4] McDonald *v.* Magruder, 3 Pet. 470; McCarty *v.* Roots, 21 How. 482; Robinson *v.* Kilbreth, 1 Bond, 592; Braham *v.* Ragland, 3 Stew. 247; Sherwood *v.* Rhodes, 5 Ala. 683; Abercrombie *v.* Conner, 10 Ala. 298; Moody *v.* Findley, 43 Ala. 167; Kirschner *v.* Conklin, 40 Conn. 77; Stiles *v.* Eastman, 1 Ga. 205; Brown *v.* Knower, 2 Ill. 469; Wilson *v.* Stanton, 6 Blackf. 507; Core *v.* Wilson, 40 Ind. 204; Armstrong *v.* Horshman, 6 C. L. J. 176 (Nov., 1877, Ind.); Hixon *v.* Reed, 2 Litt. 174; Eldridge *v.* Duncan, 1 B. Mon. 101; Denton *v.* Lytle, 4 Bush, 597; Stone *v.* Vincent, 18 Mart. 517; Knox *v.* Dixon, 4 La. 466; Gasquet *v.* Oakey, 15 La. 587; Coolidge *v.* Wiggin, 62 Me. 568; Wood *v.* Repold, 3 Har. & J. 125; Shaw *v.* Knox, 98 Mass. 214; McNeilly *v.* Patchin, 23 Mo. 40; McCune *v.* Belt, 45 Mo. 174; Stillwell *v.* How, 46 Mo. 589; Kuntz *v.* Tempel, 48 Mo. 71; Johnson *v.* Crane, 16 N. H. 68; Laubach *v.* Pursell, 35 N. J. 484; Heintzelman *v.* Lamoroux, 3 Nev. 377; Brown *v.* Mott, 7 Johns. 361; Bradford *v.* Corry, 5 Barb. 461; Love *v.* Wall, 1 Hawks, 313; Gomez *v.* Lazarus, 1 Dev. Eq. 205 (but see Daniel *v.* McCrea, 2 Hawks, 590); Williams *v.* Bosson, 11 Oh. 62; Barnet *v.* Young, 29 Oh. St. 7 (but see Douglass *v.* Waddle, 1 Oh. 423); Cogswell *v.* Hayden, 5 Oreg. 22; Aiken *v.* Barkley, 2 Speers, 747; Israel *v.* Ayer, 2 S. Ca. N. S. 344; McNeill *v.* Elam, Peck, 268; Marr *v.* Johnson, 9 Yerg. 1; Briggs *v.* Boyd, 37 Vt. 534 (but see Pitkin *v.* Flanagan, 28 Vt. 160); Farmers' Bank *v.* Van Meter, 4 Rand. 553; U. S. Bank *v.* Beirne, 1 Grat. 234; Hogue *v.* Davis, 8 Grat. 4, *accord.* — ED.

The plaintiff's maiden name was Marcella Sears, and the note was given to her; and in January, 1859, she married John Courtney. The action was originally brought against both signers of the note, and Mary A. Doyle was defaulted.

At the trial in the Superior Court before Ames, J., it appeared that the plaintiff lent three hundred dollars to Mary A. Doyle, and took the note declared on, which was then dated as of that time, and signed by Mary A. Doyle alone; that the interest was adjusted up to May 1st, 1861, at which time the note was intrusted to said Mary, who afterwards returned it with the date altered to that day, and the name of Lizzie G. Doyle added to it, signed by herself.

Upon these facts, the judge ruled that the plaintiff was not entitled to recover against Lizzie G. Doyle, and a verdict was taken accordingly; and the case was reported to this court.

A. R. Brown, for the plaintiff.

T. Wentworth (*A. F. Jewett* with him), for the defendant.

BIGELOW, C. J. The note did not on its face import a consideration. It was therefore necessary for the plaintiff to prove that it was given for value at the time it was signed by the defendant Lizzie G. Doyle. This the evidence did not show. On the contrary, the note had long previously been given by the other promisor for a consideration passing between her and the plaintiff. No new consideration existed or was received or paid when the defendant Lizzie G. signed the note. The effect of her signature was that she became a party to a previously existing contract made on a consideration wholly past and executed. There was no new contract and no new or additional consideration when the defendant Lizzie G. signed the note. Under such circumstances, on familiar and well-settled principles, she cannot be held on the promise. As to her, it was without consideration. Green *v.* Shepherd.[1] *Exceptions overruled.*[2]

[1] 5 Allen, 389, and cases cited.

[2] Tenney *v.* Prince, 4 Pick. 385; Mecorney *v.* Stanley, 8 Cush. 85; Green *v.* Shepherd, 5 All. 589; Pratt *v.* Hedden, 121 Mass. 116; Clopton *v.* Hall, 51 Miss. 482 Williams *v.* Williams, 67 Mo. 661 (*semble*), *accord*.

In the following cases notes were held binding, although the ostensible consideration for which they were given could not properly have supported a parol promise Harms *v.* Aufield, 79 Ill. 257, Collins *v.* Requa, 18 Gray, 407. — ED.

A. MULL v. JANE E. VAN TREES.

IN THE SUPREME COURT, CALIFORNIA, OCTOBER, 1875.

[*Reported in 50 California Reports*, 547.]

APPEAL from the District Court, Sixth Judicial District, County of Sacramento.

On the 5th of July, 1866, I. S. Van Trees gave the plaintiff his promissory note for one thousand dollars, due twelve months after date, and from time to time made payments on the same. He died on the 6th of December, 1873, leaving a will, in which the defendant, who was his widow, was named executrix. She qualified and entered upon the discharge of the duties of her trust. A part of the estate consisted of eight hundred acres of land, which had been community property. The executrix gave her own note for the balance due on the said note of her late husband. At the time, she gave the plaintiff this note, both she and the plaintiff labored under the mistaken opinion that the note of the deceased was not barred by the Statute of Limitations. This was an action on the note thus given by the widow. The defendant recovered judgment, and the plaintiff appealed.

McKune & Welty, for the appellant.

Does the antecedent debt of the testator constitute a sufficient consideration to support a recovery?

To this point, we cite, in support of the affirmative, Trueman *v.* Fenton,[1] Heyling *v.* Hastings,[2] Mills *v.* Wyman,[3] Earnest *v.* Parke,[4] Lloyd *v.* Maud,[5] Bryan *v.* Haneman,[6] Leaper *v.* Latton.[7]

Our statute is to the same effect. (See Code of Civil Procedure, § 360.) But it is urged, as the estate of I. S. Van Trees cannot be made to pay, that, therefore, the defendant cannot bind herself to pay the money. This does not follow as a sequence. She labors under no disabilities. The community of which she was a member had the benefit of the money loaned by plaintiff. She did contract in writing to pay; the original consideration was good, and her promise is binding. 1 Parsons on Contracts, 128; Childs *v.* Monins, Woods *v.* Riley,[8] Foster *v.* Fuller,[9] Rideout *v.* Bristow.

B. Bullard, Jr., and *Armstrong & Hinkson*, for the respondent.

The outlawed debt of the late husband was not a sufficient consideration, either valuable or moral, to support the note. Civil Code,

[1] Cowper, 544. [2] Lord Raymond, 389. [3] 8 Pick. 300.
[4] 4 Rawle, 452. [5] 2 T. R. 760. [6] 4 East, 599.
[7] 16 East, 420. [8] 27 Mo. 119. [9] 6 Mass. 58

§§ 1605–1606; Kennedy *v.* Martin,[1] Watkins *v.* Halstead,[2] Raymond *v.* Loyl,[3] Wells *v.* Vance,[4] Eastwood *v.* Kenyon.[5]

By the Court. The court below erred in its conclusion of law from the facts found. On the findings of fact, the plaintiff was entitled to judgment.

Judgment reversed and cause remanded, with an order to the court below to enter judgment for the plaintiff.

McKinstry, J., dissenting:

I dissent. It is clear that there was no moral consideration for the note given by the wife after her husband's death, so far as it represented the balance unpaid of the note of the deceased.

Nor was there any valuable consideration. The Statute of Limitations had run against any action on the note of the husband prior to his death, and it would have been the duty of the executrix to plead the statute as against such an action. The note of the husband was valueless, except so far as the contemplation of a contingency that the executrix might violate her trust, and permit a judgment to be taken against the estate, may be supposed to have given it value. But it was in her power, and it was her sworn duty to prevent such judgment. She had no legal option to plead or not plead the statute. The plea was not a personal privilege to be employed at her discretion. The law imposed on the executrix the obligation of pleading the Statute of Limitations, and I think the courts are not authorized to assume a violation of the law, for the purpose of giving a possible value to the note of the husband as a claim against the estate.[6]

THE GROCERS' BANK OF THE CITY OF NEW YORK, Respondent, *v.* THOMAS D. PENFIELD and Others, impleaded, &c., Appellants.

In the Court of Appeals, New York, May, 1877.

[*Reported in* 69 *New York Reports*, 502.]

Appeal from judgment of the general term of the Supreme Court in the first judicial department, reversing a judgment in favor of defendants, entered upon the report of a referee. (Reported below, 7 Hun, 279.)

[1] 8 Mo. 700. [2] 2 Sandf. 311. [3] 10 Barb. 487.
[4] 8 Ala. 41. [5] 11 Adol. & Ellis, 137.
[6] Didlake *v.* Robb, 1 Woods, 680, *contra*. — Ed.

This action was upon two promissory notes, of which defendants Penfield and Stone were makers, which were made payable to defendant Truax, and by him indorsed and transferred to plaintiff.

The referee found, in substance, that the notes were executed by the makers without any consideration; were accommodation notes, and were received by plaintiff solely as collateral security for a precedent debt, without any agreement to extend the time of payment of the debt, and thereupon held that plaintiff was not a *bona fide* holder, and directed judgment dismissing the complaint as to said makers.

Wm. F. Shepard, for the appellants. The payee of a promissory note, made for his accommodation, may pay an existing indebtedness with it, or transfer it as collateral for his existing indebtedness, if payment of such indebtedness is by agreement extended on the faith thereof. E. R. Bank *v.* Butterworth,[1] Cole *v.* Saulspaugh,[2] Schepp *v.* Carpenter,[3] Dezeng *v.* Fyfe,[4] Lathrop *v.* Morris,[5] Farrington *v.* Frankfort Bank,[6] Turner *v.* Treadway,[7] Bowman *v.* Van Kuren,[8] Bramhall *v.* Becket.[9] The mere taking of collateral security for an existing indebtedness does not *per se* extend the time of payment, or suspend the remedy on the original indebtedness. Gahn *v.* Neimcewicz,[10] Bank of Utica *v.* Ives,[11] Stalker *v.* McDonald, Austin *v.* Curtis,[12] Wood *v.* Robinson,[13] Carey *v.* White,[14] Place *v.* McIlvain,[15] Fellows *v.* Prentiss,[16] Bangs *v.* Mosher,[17] Albany City Ins. Co. *v.* Devendorf,[18] Matthew *v.* Coe,[19] Devlin *v.* Mayor,[20] Caswell *v.* Davis.[21]

Edmon Blankman, for the respondent. The notes in suit having been regularly indorsed, and delivered to plaintiff by the payee, and plaintiff having discounted them in the regular course of business, they became thereby its property. Demmon *v.* Boylston Bank,[22] Mont. Co. Bank *v.* Albany City Bank,[23] Essex Co. Bank *v.* Russell.[24] The maker or indorser of an accommodation note cannot set up want of consideration as a defence against it in the hands of a third person, although placed there merely as collateral security by the person entitled to negotiate it. Work *v.* Kase,[25] Lord *v.* Ocean Bank.[26] A note made for the accommodation of the indorser, without any restrictions, may be used by him for that purpose; and the holder may recover upon it,

[1] 45 Barb. 476.
[2] 48 Barb. 104.
[3] 51 N. Y. 602.
[4] 1 Bosw. 335.
[5] 5 Sandf. 7.
[6] 24 Barb. 554.
[7] 53 N. Y. 550.
[8] 29 Wis. 110.
[9] 31 Me. 205.
[10] 11 Wend. 312, 320, 321.
[11] 15 Wend. 501.
[12] 31 Vt. 64.
[13] 22 N. Y. 564, 567.
[14] 52 N. Y. 138, 142-146.
[15] 38 N. Y. 96, 98, 99
[16] 8 Den. 512.
[17] 23 Barb. 478.
[18] 43 Barb. 444.
[19] 49 N. Y. 57, 60.
[20] 63 N. Y. 18.
[21] 58 N. Y. 223.
[22] 5 Cush. Mass. 194
[23] 8 Barb. 396.
[24] 29 N. Y. 673.
[25] 34 Pa. St. 138.
[26] 20 Pa. St. 384.

even if he had knowledge of its origin, to any amount for which he holds it as security, not exceeding the amount of the note. E. R. Bank v. Butterworth,[1] Cole v. Saulspaugh.[2] Defendants are liable as makers, even though they loaned the notes to the payee. Schepp v. Carpenter,[3] Deems v. Crook,[4] Robbins v. Richardson,[5] De Zeng v. Fyfe;[6] Edwards on Notes, 316. The notes were not subject to any defence existing between the original parties. Essex Co. Bank v. Russell.[7]

RAPALLO, J. We think that the order in this case must be affirmed on the ground stated by Brady, J., in his opinion delivered at General Term. Whatever confusion may have existed upon the point, we think that we may now safely say, in the language of Professor Parsons (1 Parsons on Notes and Bills, 296), that it is universally conceded that the holder of an accommodation note, without restriction as to the mode of using it, may transfer it either in payment or as collateral security for an antecedent debt, and the maker will have no defence. (See also Story on Bills, § 192, note *m*, and Story on Notes, § 195, and authorities cited.) The existing debt is a sufficient consideration for the transfer, and no new consideration need be shown. It is only where the note has been diverted from the purpose for which it was intrusted to the payee, or some other equity exists in favor of the maker, that it is necessary that the holder should have parted with value on the faith of the note, in order to cut off such equity of the maker. Cole v. Saulspaugh,[2] Bank of Rutland v. Buck,[8] Lathrop v. Morris.[9] It has been held by high authority that an antecedent debt is sufficient even in the case of a note fraudulently diverted to constitute the holder a *bona fide* holder for value without any extension of time or surrender of securities or other new consideration. Swift v. Tyson. But in this State that doctrine does not prevail. Stalker v. McDonald. The leading authorities upon the subject are reviewed in the case of Maitland v. Citizens' Bank.[10] Whatever difference of opinion may have existed as to the case of a note diverted or fraudulently put in circulation, it must be regarded as settled that an indorsee of a negotiable note made for the accommodation of the indorser, but without restriction as to its use, taking the note in good faith as collateral security for an antecedent debt, and without other consideration, is entitled to the position of a holder for value, and not affected by the defence of want of consideration to the maker. We should not have deemed it necessary to discuss the point so much at length, but

[1] 45 Barb. 476. [2] 48 Barb. 104. [3] 49 Barb. 542.
[4] 1 Edm. Sel. Cas. 95. [5] 2 Bosw. 248. [6] 1 Bosw. 335.
[7] 29 N. Y. 673. [8] 5 Wend. 66. [9] 5 Sandf. 7.
[10] 40 Maryland, 540.

for the reason that it does not appear ever to have been previously expressly adjudicated in this court.

The order should be affirmed, and judgment absolute, &c.

All concur. *Order affirmed, and judgment accordingly.*[1]

[1] Anon., 1 Ch. Jr. 205; Percival *v.* Frampton, 2 C. M. & R. 180; Bosanquet *v.* Forster, 9 C. & P. 659; Bosanquet *v.* Corser, 9 C. & P. 664; Heywood *v.* Watson 4 Bing. 496; Molson *v.* Hawley, 1 Blatch. 409; Bridgeport Bank *v.* Welch, 29 Conn. 475; Fetters *v.* Muncie Bank, 34 Ind. 251; Washington Bank *v.* Krum, 15 Iowa, 53; Hilton *v.* Smith, 5 Gray, 400; Fellows *v.* Harris, 20 Miss. 462; Rutland Bank *v.* Buck, 5 Wend. 66; Chenango Bank *v.* Hyde, 4 Cow. 567; Grandin *v.* LeRoy, 2 Paige, 509; Lathrop *v.* Morris, 5 Sandf. 7; DeZeng *v.* Fyfe, 1 Bosw. 335; Robbins *v.* Richardson, 2 Bosw. 248; Inglis *v.* Kennedy, 6 Abb. Pr. 32; Cole *v.* Saulpaugh, 48 Barb. 104; Atlantic Bank *v.* Franklin, 55 N. Y. 235 (*semble*); Appleton *v.* Donaldson, 3 Barr, 381; Lord *v.* Ocean Bank, 20 Pa. 384; Work *v.* Kase, 34 Pa. 138; Bank *v.* Chambers, 11 Rich. 657; Kimbro *v.* Lytle, 10 Yerg. 417; Atkinson *v.* Brooks, 26 Vt. 569, *accord*.

Bramhall *v.* Beckett, 31 Me. 205; Bowman *v.* Van Kuren, 29 Wis. 209 (*semble*), *contra*.

Conf. Platt *v.* Chapin, 49 How. Pr. 318. — Ed.

SECTION V.

A Bill or Note, like a Bond, is a Chattel.

YEOMAN *v.* BRADSHAW.

IN THE KING'S BENCH, EASTER TERM, 1696.

[*Reported in* 3 *Salkeld*, 70.[1]]

PER HOLT, C. J. A bill of exchange shall be *bona notabilia* where the debtor is, and not where the bill is, for it is in law no specialty; for if an executor pays debts upon simple contracts, or suffers judgment to pass against him upon actions on such contracts, yet he may plead such payment or judgment in bar to an action on a bill of exchange, and such bill is like an award in writing, which is no chattel where the award itself lies; and in pleading such award or a bill of exchange, it is never said *hic in curia prolat'*,[2] which shows they are no specialties, and so it was adjudged; though it was objected that the paper on which it was written was evidence that it was a debt, and that trover and conversion would lie for it, and consequently it must be goods and chattels, and therefore ought to be considered as *bona notabilia*, where the bill or award was.[3]

[1] 1 Carth. 373; 3 Salk. 64, s. c. — ED.

[2] Conf. Mitchell *v.* Conley, 13 Ark. 416; Smith *v.* Simms, 9 Ga. 418; Anderson *v.* Allison, 2 Head, 122. — ED.

[3] At the time of this decision, a defendant in an action upon a bill or note was permitted, in the King's Bench, to change the venue as in actions upon simple contracts. This court, however, afterwards abandoned its own practice, and adopted that of the Court of Common Pleas, by which a bill or note was treated as a specialty in the matter of change of venue. This being so, the argument of Gibbs in Pinkney *v.* Collins, 1 T. R. 571, which was approved by the court in Pickard *v.* Featherstone, 5 L. J. C. P. 38, would seem to be well founded, notwithstanding the criticism of Parke, B., in Mondel *v.* Steele, *infra*, p. 691, note 1. See also Att'y-Gen. *v.* Bouwens, 4 M. & W. 171; Att'y-Gen. *v.* Pratt, L. R. 9 Ex. 140. In the latter case, a testator died in India while bills drawn in India upon a London bank in favor of the testator's English bankers were on their way to England. The bills were accepted and honored. It was held that the executor in England, who had taken out probate there, must pay probate duty upon the amount of the bills. Kelly, C. B., said, p. 144: "It is a fallacy to consider bills of exchange only under the notion of debts. There was, in truth, at the time of the testator's death, no debt whatsoever from any person. The bills were drawn in India on a bank in London; but they had not reached maturity, they had not been accepted, they had not been even presented. There was, therefore, no debt; but I think they were, nevertheless, property and assets, on the simple ground that they were personalty, in respect of which trover might have been maintained by the executor long before any debt or any debtor in respect of them existed.

HOLCROFT v. COLLWEST.

In the King's Bench, Michaelmas Term, 1737.

[*Reported in Andrews*, 65.]

Motion by *Mr. Clayton* to discharge a rule granted on the common affidavit for changing the venue from London to Lancaster, in an action upon a promissory note. And he argued that the venue is never changed in actions on bonds; and there is the same reason against changing the venue in the case of notes, these being considered since the late statute in the nature of specialties. And the same requisites are necessary to be proved at the trial in both cases. And for these reasons, he said, in the Common Pleas the venue is always refused to be changed. He also cited Salk. 699; Elliot and Mann,[1] in this court. There, in an action on an inland bill of exchange, it was moved to change the venue; but it was never determined. And he mentioned other cases, but none in point.

The whole court (except Chapple, J.) were against discharging the rule for changing the venue. And they said that whatever the practice of the Common Pleas may be, there is no instance where, in this court, the venue was refused to be changed in actions on promissory notes. And Page, J., said, there is no difference between an action on a note of hand and one on a parol promise; both being actions on the case, and the note is only evidence of the debt: and the statute doth not alter the nature of the action. But Chapple, J., inclined to the contrary. For (he said) in actions on a deed, or specialty, the venue is never changed; and the books relating to mercantile affairs call promissory notes by the name of specialties. And, as these notes now frequently pass through many indorsements, a great deal of proof may lie on the plaintiff. And he cited the following cases, all of which were in the Common Pleas. Vigars *v.* Vigars.[2] Motion to change the venue in an action on a promissory note, but denied. Ward *v.* Cocklow,[3] in the same term. In the case of a note, the like motion was made and denied. Lutwich *v.* Wilcox.[4] Motion in that case to change the venue, in an action upon a policy of insurance, from Cumberland to Bristol, or the adjacent county. And the court said that, in actions on promissory notes, it was not the practice to change the

They were personal chattels of great value; and the lawful owner of them could, on the day after the decease of the testator, have sold them for something very little short of their full value. They were, therefore, assets belonging to the executor, to which probate duty attached." — Ed.

[1] Hil. 2 Geo. II. [2] Trin. 9 Geo. II. [3] Barnes, 480. [4] Barnes, 480.

venue, but that it might be different in the cases of policies. However, the motion being to change the venue into an adjacent county, it was denied.

In the principal case, a rule was granted to show cause, &c.[1]

[1] The practice in the King's Bench was afterwards settled in conformity with the opinion of Chapple, J., as appears by the following extract from Tidd's Practice: "And as it is necessary, for changing the venue, that the cause of action should be *wholly* confined to a single county, the courts will not change it in an action of *debt* on bond or other specialty, or in covenant on a lease, or policy of insurance by deed, or in assumpsit on an award, or charter-party of affreightment, unless some special ground be laid; for *debitum et contractus sunt nullius loci*, and bonds and other specialties are *bona notabilia* wherever they happen to be. And it is now holden in the King's Bench, agreeably to the practice of the Court of Common Pleas, that the venue cannot be changed, unless upon a special ground, in an action upon a promissory note or bill of exchange. . . . But the venue may still be changed in an action upon a policy of insurance, not being by deed; or in any other action, the right of which is founded upon simple contract." 1 Tidd, 9 ed. 603, 604.

In Mondel v. Steele, 1 Dowl. N. s. 155, Parke, B., in delivering the opinion of the court, said: "The first exception to the right which a defendant has to change the venue was in the case of specialties, which have their binding effect by virtue of the instrument alone, and are *bona notabilia* where they happen to be. Bills of exchange and promissory notes were afterwards put on the same footing, presumably because they were considered as being in the nature of specialties; for in Holcroft v. Collwest, in the King's Bench, Chapple, J., assigned that as one ground for refusing to change the venue. In Pinkney v. Collins, 1 T. R. 571, Gibbs, *arguendo*, stated that the reason of the exception, as to notes and bills, was that they were *bona notabilia* where they happen to be. This was certainly a mistake (Yeomans v. Bradshaw), though it may have been the reason for the practice. But, on whatever ground it has been adopted, the practice has certainly been established for more than a century in the Common Pleas, but for a far less time in the King's Bench,[1] not to allow the venue to be changed in actions on specialties, bills of exchange, or promissory notes. But the instances of exempting plaintiffs in actions of assumpsit, on other written instruments, from the obligation of suing in the proper county, are comparatively few and recent." The learned Baron then reviewed shortly the cases Whitburn v. Staines, 2 B. & P. 355; Morrice v. Hurry, 7 Taunt. 306; Slade v. Trew, 1 C. & M. 584; and Roberts v. Wright, 1 Tyrwh. 532, and added: "In this state of the authorities, we think that it cannot be laid down as a general proposition that the venue is not to be changed in actions on written instruments, appearing by the declaration to be in writing. There does not seem to be any principle, and but little precedent, in support of so extensive an exception to a general rule, which, in conformity with the statute law, is that actions should be tried where the causes of action arise; and the exceptions to that rule should not be readily extended. We think that in all actions on contracts, although in writing, except on specialties, bills, and notes, the venue may be changed upon the usual affidavit being made." In Webb v. Inwards, 5 C. B. 488, 485, V. Williams, J., cited with approval the opinion of Parke, B., in Martin v. Daws, 11 M. & W. 784, that, "since the case of Mondel v. Steele it was to be considered that the rule which prohibited the change of venue applied only to actions of debt or covenant on a specialty, and to bills or notes, and therefore not to an action on an award, which, although under seal, was not a specialty." — Rp

[1] It was not established in 1751. See Kirk v. Broad, Sayer, 7

POPHAM v. LADY AYLESBURY.

IN CHANCERY, BEFORE LORD HARDWICKE, NOVEMBER 5, 1748.

[*Reported in Ambler*, 68.]

THE late Earl of Aylesbury devised all his freehold and leasehold estates whatsoever (except the house he inhabited) to his wife, the defendant, the Earl of Oxford, Mr. Popham, and others, and their heirs, executors, and administrators, respectively, in trust, by and out of the rents and profits thereof, or by sale or mortgage, to pay and discharge all such of his debts and legacies as his personal estate should not be sufficient to pay. Then he gives his lady his house in Warwick Street, for the remainder of the term he had therein, with all that should be in it at his death; and afterwards gives to his aforesaid trustees all his freehold, leasehold, and personal estate whatever (except his said house), subject to his debts and legacies, to the use of them, their heirs, executors, and administrators, in trust, &c.[1]

There were in the house at his death bank-notes to the value of £800, and £260 in cash.

The question was whether the cash and bank-notes should pass to Lady Aylesbury, under the words, "with all that should be in it at his death;" and it was held that they should, bank-notes being the same as ready money; otherwise, of bonds and other securities; they not being cash, but only evidence of so much money due, and would not pass by these words. Domat, l. 4, t. 2, s. 4, p. 15, fo. 163.[2]

[1] The statement of the case has been abbreviated. — ED.

[2] In Stuart v. Bute, 11 Ves. 662, Lord Eldon said: "I have seen Lady Aylesbury's Case, which is also mentioned by Lord Mansfield in Miller v. Race, but has never been cited accurately. It was a bequest of 'my house and all that shall be in it at my death.' Lord Hardwicke held, that cash passed; and bank-notes, which Lord Hardwicke there, I do not know why, considered as cash; but not promissory notes and securities; and they were the evidence of title to things out of the house, and not things in it. Bank-notes I think just in the same situation."

Notwithstanding this criticism, Lord Hardwicke's distinction has been followed; and bills and notes, even though payable to bearer, if not bank-notes, do not pass under a bequest of goods, &c., in a particular place. Brooke v. Turner, 7 Sim. 671; Hertford v. Lowther, 7 Beav. 1. But see Lock v. Noyes, 9 N. H. 430, *contra*.

Conf. Penniman v. French, 17 Pick. 404. — ED.

T-706

MERCER v. JONES.

AT NISI PRIUS, CORAM LORD ELLENBOROUGH, C. J., DECEMBER 20, 1813.

[*Reported in* 3 *Campbell*, 477.]

TROVER for bills of exchange.

The question was, how the damages were to be calculated, the plaintiff contending that he was entitled to interest to the time of final judgment, and the defendant that in this form of action the principal only was recoverable.

LORD ELLENBOROUGH. In trover, the rule is that the plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion. There is no reason why this rule should not be applied to trover for bills of exchange. The damages, therefore, in this case, must be calculated by the amount of the principal and interest due upon the bills of exchange at the time of the demand and refusal to deliver them up. *Verdict accordingly.*[1]

[1] Paine v. Pritchard, 2 C. & P. 558, *accord.*

In Booth v. Powers, 56 N. Y. 22, Folger, J., delivering the opinion of the court, said, p. 27: "In an action of this kind, the amount appearing to be unpaid upon the note, of principal and interest at the time of the conversion, and the interest at the time of the conversion, and the interest upon that aggregate from thence to the trial, is *prima facie* the measure of damages. The defendant has the right to show in reduction the fact of payment in whole or in part, the inability of the makers to pay wholly or partially, a release of the makers from their undertaking, the invalidity of the note, or other matter which will legitimately affect and diminish its value."

And see, to the same effect, Mathew v. Sherwell, 2 Taunt. 439; Evans v. Kymer, 1 B. & Ad. 528, 534; Alsager v. Close, 10 M. & W. 576; St. John v. O'Connel, 7 Port. 466; Zeigler v. Wells, 23 Cal. 179; Latham v. Brown, 16 Iowa, 118; Greenfield Bank v. Leavitt, 17 Pick. 1; King v. Ham, 6 All. 298; Rose v. Lewis, 10 Mich. 483; Ninninger v. Banning, 7 Minn. 274; Menkens v. Menkens, 28 Mo. 252; Bredow v. Mut. Sav. Inst., 28 Mo. 181; Ingalls v. Lord, 1 Cow. 240; Allen v. Suydam, 20 Wend. 335, 336; Neff v. Clute, 12 Barb. 469; Decker v. Mathews, 12 N. Y. 324; Potter v. Merchants' Bank, 28 N. Y. 641; Brightman v. Reeves, 21 Tex. 70; Robbins v. Packard, 31 Vt. 570. Conf. Mowry v. Wood, 12 Wis. 413, 420.

The measure of damages for the conversion of bank-notes or negotiable bonds is their market value at the time of conversion, with interest. Brown v. Memphis, 7 Am. L. Rev. 67; Shelton v. French, 38 Conn. 489; Smith v. Dunlap, 12 Ill. 184; Callanan v. Brown, 31 Iowa, 333; Griffith v. Burden, 35 Iowa, 138; Simpkins v. Low, 49 Barb. 382; Tracy v. Talmadge, 14 N. Y. 162.

"Bills or notes are not the subject of larceny at the common law; for it is said that bills or notes are choses in action, and a chose in action cannot be stolen. But by the 24 & 25 Vict. c. 96, § 27, the stealing of any bill, note, warrant, or order for the payment of money, is made felony, of the same nature, and in the same degree, and punishable in the same manner, as larceny of any chattel of like value with the money due on the security." Byles, Bills (11th ed.), 177. — ED.

ARCHIBALD M'NEILAGE *v.* JOHN PETER HOLLOWAY.

IN THE KING'S BENCH, JANUARY 23, 1818.

[*Reported in* 1 *Barnewall & Alderson*, 218.]

DECLARATION stated that S. Branscomb, before the intermarriage of plaintiff with one Anne Innes, according to the usage and custom of merchants, duly made her certain bill of exchange, and directed the same to defendant, by which the said Sarah requested defendant to pay, three months after the date thereof, to Anne Innes or her order, £187, 10*s*., for value received, and delivered the bill to said Anne, which bill defendant accepted, &c.; and plaintiff avers that after making the bill, and before same became payable according to the tenor and effect thereof, &c., at, &c., he intermarried with the said Anne Innes, by means whereof defendant, after the intermarriage of plaintiff with said Anne, &c., became liable to pay to plaintiff the money in the bill specified, according to the tenor and effect of the bill and of his acceptance; and being so liable, defendant, in consideration thereof, after the intermarriage of plaintiff with said Anne, &c., promised plaintiff to pay him the money in the bill specified, according to the tenor and effect of the bill, and of his acceptance thereof.

Plea: non assumpsit.

Scarlett, in the last term, had obtained a rule, calling on plaintiff, who had upon this declaration obtained a verdict, to show cause why the judgment should not be arrested, on the ground that the wife ought to have been joined in the action: against which rule cause was now shown by

Marryat and *Deacon*. In this case the husband might well sue alone. It is very true that in many cases it has been decided that the wife must be joined with the husband, as in all actions for debts due to her *dum sola*, Fenner *v.* Plaskett,[1] 1 Roll. Abr.,[2] Garforth *v.* Bradley,[3] Bull. N. P.[4] Milner *v.* Milnes.[5] But where the right of action is inchoate before the marriage, and consummate after, there he may either sue alone or join the wife in the action. As in trover, where the trover is before, and the conversion after, the marriage, Powes & Ux. *v.* Marshall,[6] Blackborne & Ux. *v.* Greaves.[7] In those cases the

[1] Moor. 422.
[2] P. 347, R. pl. 8.
[3] 2 Ves. 676, 677.
[4] P. 179.
[5] 3 T. R. 627.
[6] 1 Sid. 172.
[7] 2 Lev. 107.

only doubt was whether the husband could join the wife. So, where the wife's land is granted before the marriage on lease; there the husband must join the wife in an action for rent accruing before the coverture; but for rent subsequently accruing he may either join her or sue alone. There the lease, which is the foundation of the debt, is granted before the marriage, and rent accrues after. So here the acceptance, which is the foundation, is before the coverture, and the bill becomes due after. It follows, therefore, that here he may either join the wife or sue alone. In Sir John Brett *v.* Cumberland,[1] the court held that in covenant against lessee for years, for not repairing during coverture, where the reversion was granted to husband and wife, he may either sue alone or join his wife; and in the report of that case in Bulstrode,[2] it is laid down by Doddridge, J., to which Coke, C. J., assents, that the husband may well have an action in his own name, without his wife, for the recovery of that which he may discharge alone, and of which he may make disposition to his own use. But secondly, this bill of exchange is to be considered rather as a chattel personal than a chose in action. It is in its nature assignable, transferable by indorsement, and capable of being appropriated, as it has been in fact, by the husband. The act of marriage operates as a transfer of it to him in law, and is a virtual indorsement. The wife could not, after the marriage, have indorsed it; Barlow *v.* Bishop; and the husband might have done so.

Scarlett, contra. The principle which governs the question, whether the husband shall sue alone or join his wife, is that of survivorship. If the debt will survive to the wife, supposing the husband not to have reduced it into possession in his lifetime, then he must join her in an action for it; otherwise not. The rule is very clearly laid down by Lord Kenyon in Milner and Others *v.* Milnes,[3] that all personal chattels of the wife are given by the marriage to the husband, and for the recovery of them he may bring an action alone; but that in order to reduce a chose in action into possession he must join the wife. Then here a bill of exchange is a chose in action. But it is contended that it is a chose in action of a peculiar nature. It is transferable undoubtedly; but that is by custom of merchants alone. And the custom of merchants provides that it shall be transferred only in one way; viz., by indorsement. But except in this particular it remains like any other chose in action. There is no indorsement here. But it is contended that the marriage operates as a transfer. It may operate as a transfer; but it cannot be a transfer according to the custom of merchants; and if not, then the bill of exchange remains as any other

[1] Cro. Jac 309. [2] 3 Bulst. 164. [3] 3 T. R. 631.

chose in action; which, if the husband wishes to reduce into possession, he must do so by joining the wife in the suit. Unless, therefore, he does so, or passes it away by indorsement, it would, after his death, survive to the wife.

Lord Ellenborough, C.J. It is laid down in Coke upon Littleton,[1] and Comyns's Dig.[2] that all chattels personal which the wife has in possession in her own right are vested in the husband by marriage, although he do not survive her. This is a rule of law universally recognized. The words chattels personal are sufficiently large to cover a negotiable instrument of this sort; it is payable to her order; and if the relation of husband and wife had not subsisted, a formal indorsement to transfer the property in the instrument would have been necessary; then the question is whether, the marriage having vested the right in the husband, it be necessary to go through the form of an indorsement. The law does not require superfluous acts; is it then necessary that that should appear on the face of the bill? It can only be necessary as evidence of an election, on his part, to take to the property in his marital right; but that is unequivocally shown, by bringing the action in his own name. No case having been cited to show that a formal indorsement is necessary, I think that by the act of marriage itself, he is virtually an indorsee: if he had appeared as such on the face of the bill, there could be no doubt of his right to maintain this action; but the marriage has in fact given him all the rights of an indorsee, and it therefore seems to me to be unnecessary for us to go through the formal derivation of title by indorsement.

Bayley, J. I am of the same opinion. This being a negotiable security, the right of action shifts with the possession. Chattels personal vest absolutely in the husband by marriage. Choses in action do not; for in order to reduce them into possession it is necessary to join the wife. The case of a negotiable security is a middle case; whoever has the instrument in his possession, and the legal right to it, may sue upon it in his own name. It differs in this respect from a bond and other securities not negotiable. By assigning a bond, a right of suing only in the name of the obligee is conferred. The bill is payable to the wife, and the effect of the marriage is not to destroy the negotiability of the instrument; in whom then will the power of indorsing vest? certainly not in the wife, for her power to do so is superseded by the marriage; then it must be in the husband. It may be said that he could not indorse to himself; perhaps not; because in that case there would be no transfer; but that must be on the ground of his having the entire interest in the bill without indorsement. We

[1] 351, b. [2] Baron and Feme E. 3.

break in upon no principle, therefore, by saying that this is a species of property in the possession of the wife at the time of the marriage, which by the act of marriage itself vested in the husband.

ABBOTT, J. I entertained some doubts upon this subject, but upon the discussion, I think that the rule ought to be discharged. This is to be considered rather as a chattel personal than a chose in action. All chattels personal vest in the husband by the marriage; the latter do not absolutely vest in the husband. The reason appears to be that choses in action are not assignable by law; and actions upon those instruments must be in the names of the original parties; but a bill of exchange is transferable by indorsement; and an action may be brought upon it in a name different from that of the original payee. But the indorsement by which it is transferred must be made by a person having the disposing power; now after marriage the wife has no such power. That power by the marriage is vested in the husband, and it is unnecessary for him to go through the useless form of indorsing it to himself.

HOLROYD, J. If this instrument were a mere chose in action, it would be necessary to have joined the wife. The marriage cannot operate to transfer a chose in action. The principle laid down in the case cited from Bulstrode applies to the present case; it is there said by Doddridge, J., to which Coke, C.J., agreed, "that that which the husband may discharge alone, and of which he may make disposition to his own use, for the recovery of this, he may well have an action in his own name, without his wife." In the case of a chose in action, he cannot dispose of it to his own use; but a bill of exchange is transferable by law. The marriage vested that right of transfer in the husband, and upon that the right of action is consequent. The husband then having the right of disposal, may, according to the rule above laid down by Doddridge, sue alone. Upon these grounds, I think the rule for arresting the judgment ought to be discharged.

Rule discharged.[1]

[1] Ex parte Barber, 1 Gl. & J. 1, *accord.*

The principal case is undoubtedly law; but it can be upheld only upon the principle that negotiable securities are chattels personal, as distinguished from choses in action, within the rule that a woman's chattels personal vest in the husband by her marriage, while her choses in action do not so vest. For the only reason why a chose in action does not pass to the husband is that a chose in action is not assignable at law; in other words, a chose in action must always be collected at law in the name of the original obligee, or, in case the original obligee has become a married woman, in the joint names of the husband and wife, the husband being joined for conformity. If the note in the principal case, therefore, should be regarded simply as a chose in action, the decision would be clearly erroneous.

Furthermore, unless a negotiable security is a chattel within the rule above men

tioned, marriage must put an end to its negotiability. For if it is treated as a chose in action, and therefore not legally assignable, the husband, not having acquired the legal title, cannot transfer it; and of course the wife could not indorse the security so as to deprive the husband of his right to reduce it to possession. But it is clearly established that an indorsement by the husband in his own name (Mason v. Morgan, *supra*, Vol. I. p. 394), or an indorsement by the wife, as his agent (Cotes v. Davis, *supra*, Vol. I. 398), of a bill or note executed to the order of the wife before their marriage, is a valid transfer of the legal title; and of course a bill executed to a woman after her marriage is transferable in the same way.

Nevertheless, it must be conceded that the courts, while professing to support the decision in the principal case, have criticised somewhat severely the view that a bill or note is a personal chattel. In Richards v. Richards, 2 B. & Ad. 447; Gaters v. Madeley, 6 M. & W. 423; Scarpellini v. Atcheson, 7 Q. B. 864; Caldwell v. Bower, 17 Mo. 564; Wilder v. Aldrich, 2 R. I. 518, it was held that a note made payable to the wife after her marriage would survive to her, if not reduced to possession by the husband before his death. In Hart v. Stephens, 6 Q. B. 937; Allen v. Wilkins, 8 All. 321, it was held that the interest in a note executed to a woman who afterwards married would pass, upon her death, to her representatives. In Sherrington v. Yates, 12 M. & W. 855, it was held that the assignees of a bankrupt could not maintain an action in their own names alone, on a note made to the bankrupt's wife before her marriage. But in all these cases except Scarpellini v. Atcheson, Allen v. Wilkins, and Wilder v. Aldrich, the notes were not negotiable, and of course were to be treated like ordinary choses in action. See also Latourette v. Williams, 1 Barb. 9; Stearns v. Stearns, 30 Vt. 213. In Scarpellini v. Atcheson, the note was negotiable and actually indorsed to a third party, who after the death of the husband gave the note to the widow, who thereby became entitled to the instrument. In Scott v. Simes, 10 Bosw. 314, the husband had transferred the beneficial interest in the note to his wife. Wilder v. Aldrich and Allen v. Wilkins, it is conceived, cannot be supported. In Davis v. Newton, 6 Met. 537, and Smith v. Chandler, 8 Gray, 392, it was assumed that the assignees of a bankrupt might maintain an action in their own names upon a negotiable note made to the wife after her marriage.

The only English *decision* which conflicts with the doctrine that a negotiable security is a chattel personal within the rule above mentioned is Philliskirk v. Pluckwell, 2 M. & Sel. 393, where it was held that the husband and wife might join in an action upon a negotiable note made to the wife after the marriage. But it is impossible to reconcile this decision with the following cases: Burrough v. Moss, *supra*; Howard v. Oakes, 8 Ex. 136, 140 (*semble*); Hollifield v. Wilkinson, 54 Ala. 275; Young v. Ward, 21 Ill. 223 (*semble*); Sutton v. Warren, 10 Met. 451; Stevens v. Beals, 10 Cush. 291 (*semble*); Work v. Glaskins, 33 Miss. 539 (*semble*); Dunn v. Hornbeck, 7 Hun, 629 (*semble*); Fort v. Brunson, 2 Speers, 658, in which it was held that the husband might maintain an action in his own name upon a note made to his wife after her marriage.

It has been said, it is true, that "a husband may sue either alone or jointly with his wife on contracts made after marriage with his wife alone." Dicey, Parties, p. 181. It may be a question, indeed, in each case, whether the interest in the obligation was really created for the husband or the wife; the mere fact that a married woman is made obligee in an obligation being by no means conclusive evidence that the obligation was really intended for her benefit. Fleet v. Perrins, L. R. 3 Q. B. 536; L. R. 4 Q. B. 500, s. c. But it seems impossible to maintain the doctrine just cited, that, in proceeding upon an obligation made to a married woman, the husband may, at his option, declare either as sole plaintiff or as coplaintiff with his wife. If he is the real obligee, he and he only should sue; if his wife is the real obligee, she must sue as obligee, and her husband should be joined for conformity. — Ed.

RANKIN v. WEGUELIN.

IN CHANCERY, BEFORE SIR JOHN LEACH, M. R., JUNE 2, 1829, JUNE 7, 14, 1832.

[*Reported in 27 Beavan*, 309.]

COLONEL WEGUELIN died on the 23d of May, 1828, and the three plaintiffs were his executors.

The defendant, his widow, claimed three bills of exchange under a gift to her by way of *donatio mortis causa*. On the 2d of June, 1829, the ordinary administration decree was made, containing a reference to the master to inquire under what circumstances the three bills of exchange or promissory notes, amounting together to £300, had been given by the testator to Mrs. Weguelin.

Master Farrer made his report on the 15th of March, 1832, in which he included the three bills amongst the outstanding estate, and he found as follows: A fortnight before the death of the testator, Mary Weguelin was in attendance upon him, when he desired her to give him a bundle of papers from his private drawer, in which he was accustomed to keep papers of importance, and, upon her doing so, he selected out of such bundle of papers the three bills of exchange for £124 12*s.* 8*d.*, and £124 12*s.* 8*d.*, and £62 10*s.*, before mentioned, and, having noted in pencil when they would fall due, the testator placed them in her hands, and in a very emphatic manner said to her, "My dear Mary, I give them to you: remember to send them for payment when due;" the testator being under the apprehension of death, and thereby meaning, as Mary Weguelin submitted, to give the bills to her for her own use and benefit in case he should die. And he found that Mary Weguelin, having so received the said bills, held and kept them in her own possession until after the death of the testator, and she received the amount of the bills as and when the same became due through her bankers. And he also found that Mary Weguelin, on or about the 30th of October, 1828, paid the sum of £311 15*s.* 4*d.*, the amount and produce of the three bills, to the plaintiffs, the executors of the said testator, but expressly without prejudice to her claim thereto.

These bills were in the following form:—

"£124 12*s.* 8*d.* FORT WILLIAM, 30th June, 1827.

"At twelve months after date of this our first of exchange (second and third of same tenor and date not being paid), pay or cause to be

paid unto Lieutenant-Colonel Thomas M. Weguelin, or order, the sum of pounds sterling one hundred and twenty-four, twelve shillings and eightpence, in satisfaction of interest on six per cent promissory notes of the Bengal remittable debt.

"Signed by order of the Governor-general in Council,

"H. J. PRINCEP,

"*Acting Secretary to the Government.*

"To the Honorable the Court of Directors for affairs of the Honorable United Company of Merchants of England trading to the East Indies.

"LONDON.

"Accepted by order of the said Court.

"J. DART, *Secretary.*"

The plaintiff, Colonel Rankin (who was an executor), in his affidavit stated that, a few days after the testator's death, Mrs. Weguelin delivered the three bills into his hands, and "asked his advice as to the course proper for her to pursue with regard to the bills; and he advised her to pay the same into her bankers, to be received when due; and Mary Weguelin acquiesced in such advice; and deponent, at her request, carried the said bills to Messrs. Coutts & Co., the bankers of Mary Weguelin, and paid in the same to her account. And he said that the amounts of the bills were received by Messrs. Coutts & Co. for the account of Mary Weguelin;[1] but it was afterwards agreed between Mary Weguelin and the deponent and the executors of the testator, Thomas Matthias Weguelin, that she should pay over the amount of the bills to the executors, to be held by them, without prejudice to her rights, until the hearing of this cause; and accordingly Mary Weguelin, on or about the 28th of October, 1828, paid the amount of the three bills (being £311 15*s.* 4*d.*) to the said executors."

Mary Weguelin took an exception to the report, for that the master had included the three bills as part of the testator's personal estate not specially bequeathed. "Whereas, the master ought not to have included the said bills in such schedule, but ought to have allowed the defendant to retain the same three bills of exchange, or the amount thereof, for her own proper use and benefit, as having been a *donatio mortis causa* to this defendant."

The exceptions were heard before Sir John Leach on the 7th of June, 1832.

Mr. Bickersteth, for Mrs. Weguelin.

Mr. Pemberton and *Mr. Rolfe*, for other parties.

[1] It did not appear from the papers in the registrar's or master's offices whether the bills had been indorsed by Colonel Weguelin or by his executors.

Sir John Leach (M. R.) reserved judgment.

Sir John Leach (M. R.) allowed the exception, and declared "that the gift of the three bills of exchange was a good *donatio mortis causa*, and that the defendant was entitled to the amount thereof for her own use;"[1] and he ordered the amount to be paid to her out of the funds in court.[2]

[1] Veal *v.* Veal, 27 Beav. 303; Jones *v.* Deyer, 16 Ala. 221; Brown *v.* Brown, 18 Conn. 410; Turpin *v.* Thompson, 2 Met. (Ky.) 420; Ashbrook *v.* Ryon, 2 Bush, 228; Southerland *v.* Southerland, 5 Bush, 591; Borneman *v.* Sidlinger, 15 Me. 429; 21 Me. 185; Sessions *v.* Moseley, 4 Cush. 87; Bates *v.* Kempton, 7 Gray, 382; Chase *v.* Redding, 13 Gray, 418; Coutant *v.* Schuyler, 1 Paige, 316; Westerlo *v.* De Witt, 36 N. Y. 340; Gourley *v.* Linsenbigler, 51 Pa. 345 (*semble*); Overton *v.* Sawyer, 7 Jones (N. Ca.), 6 (*semble*); Brunson *v.* Brunson, Meigs, 630; Caldwell *v.* Renfrew, 33 Vt. 213, *accord*.

Miller *v.* Miller, 3 P. Wms. 356 (*overruled*); Bradley *v.* Hunt, 5 Gill & J. 54, *contra*.

A bond may be the subject of a *donatio mortis causa*. Snellgrove *v.* Baily, 3 Atk. 214; Duffield *v.* Elwes, 1 Bligh, N. S. 542; Gardner *v.* Parker, 3 Mad. 184; Staniland *v.* Willott, 3 Mac N. & G. 676; Waring *v.* Edmonds, 11 Md. 424; Wells *v.* Tucker, 3 Binn. 366; Lee *v.* Boak, 11 Grat. 182. So may a policy of insurance, which, like a bill, is a specialty. Witt *v.* Amis, 1 B. & S. 109; 33 Beav. 619. Or a bank deposit note. Amis *v.* Witt, 33 Beav. 619; Moore *v.* Moore, L. R. 18 Eq. 474; Dunn *v.* Boyd, Ir. R. 8 Eq. 609.

But simple contracts are not the subject of a *donatio mortis causa; e. g.*, a depositor's pass-book. Beak *v.* Beak, L. R. 13 Eq. 489; M'Gonnell *v.* Murray, Ir. R. 8 Eq. 460; Ashbrook *v.* Ryon, 2 Bush, 228; Murray *v.* Cannon, 41 Md. 466 (*semble*). But see Hill *v.* Stevenson, 63 Me. 364 (*semble*); Sheedy *v.* Roach, 124 Mass. 472; Tillinghast *v.* Wheaton, 8 R. I. 576, *contra*. And conf. McGrath *v.* Reynolds, 116 Mass. 566; Fiero *v.* Fiero, 5 Th. & C. 151; Curry *v.* Powers, 70 N. Y. 212; Case *v.* Denison, 9 R. I. 88; Dean *v.* Dean, 43 Vt. 337.

Nor certificates of stock: Moore *v.* Moore, L. R. 18 Eq. 474; Pennington *v.* Gittings, 2 Gill & J. 208. Grymes *v.* Hone, 49 N. Y. 17, is *contra*, but certificates of stock are *quasi* negotiable securities in New York.

Nor South Sea Annuities: Ward *v.* Turner, 2 Ves. 431.

Nor an I O U: M'Gonnell *v.* Murray, Ir. R. 3 Eq. 470 (*semble*); Byles, Bills (11th ed.), 175.

In England, a bill or bond cannot be the subject of a gift *inter vivos*. Edwards *v.* Jones, 1 My. & Cr. 226. (Conf. Barton *v.* Gainer, 3 H. & N. 387; Witt *v.* Amis, 1 B. & S. 199, and Overton *v.* Sawyer, 7 Jones (N. Ca.) 6, as to the title to the document as distinguished from the obligation.) But in this country the English distinction between a *donatio mortis causa* and a gift *inter vivos* is not followed.

E. g. bonds: Hunt *v.* Hunt, 119 Mass. 474; Hackney *v.* Vrooman, 62 Barb. 650; Elam *v.* Keen, 4 Leigh, 333; Lee *v.* Boak, 11 Grat. 188 (*semble*). But see, *contra*, Fairly *v.* McLeon, 11 Ired. 158.

Bills or notes: Jones *v.* Deyer, 16 Ala. 225 (*semble*); Wing *v.* Merchant, 57 Me. 383; Grover *v.* Grover, 24 Pick. 261; Hale *v.* Rice, 124 Mass. 292; Westerlo *v.* De Witt, 36 N. Y. 340 (*semble*); Brunson *v.* Brunson, Meigs, 630. But see Johnson *v.* Spies, 5 Hun, 468 (*semble*); Brickhouse *v.* Brickhouse, 11 Ired. 404, *contra*.

Conf. Camp's Appeal, 36 Conn. 88; Briscoe *v.* Eckley, 35 Mich. 112; Penfield *v.* Thayer, 2 E. D. Sm. 395; Gray *v.* Barton, 55 N. Y. 68. — Ed.

[2] Reg. Lib. B. 1831, fol. 2385.

THE MAINE FIRE AND MARINE INSURANCE COMPANY v. LEMUEL WEEKS AND TRUSTEES.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, MAY TERM, 1811.

[*Reported in* 7 *Massachusetts Reports*, 438.]

THE persons summoned in this case as the trustees of the defendant Weeks, having severally sundry demands against him, Weeks delivered to them two promissory notes payable to him and another, or order, and indorsed in blank by the promisees, which were deposited with the supposed trustees, to hold until it should be ascertained whether certain other property, conveyed to them, would be sufficient to indemnify them, in which event they were to restore the notes to Weeks. From a statement exhibited by the trustees, it did not appear that the proceeds of those notes were necessary to their indemnity.[1]

Upon the disclosure of these facts, the question before the court was, whether the persons summoned as trustees were liable to be charged.

BY THE COURT. These promissory notes were assigned to the supposed trustees as a further indemnity, if needed. It appears that they were not needed, and the defendant had a right to reclaim them. But, to charge the trustees, it is necessary that the principal have a cause of action against them, or the trustees must have personal chattels in possession, belonging to the principal, capable of being seized and sold upon execution. Negotiable notes are not such chattels. The defendant Weeks had no cause of action against these trustees on account of the notes, until a demand by him, and a refusal on their part to deliver them. If such demand and refusal had taken place, they would have been chargeable. As the facts are upon this disclosure, they must be discharged.[2]

[1] The statement of facts has been slightly abbreviated. — ED.

[2] Jones v. Norris, 2 Ala. 526; Marston v. Carr, 16 Ala. 325; Pearce v. Shorter, 50 Ala. 318; Fitch v. Waite, 5 Conn. 117; Grosvenor v. Farmers' Bank, 13 Conn. 104; Wilson v. Albright, 2 Greene, 125; Rundlet v. Jordan, 3 Greenl. 47; Clark v. Viles, 32 Me. 32; Smith v. Kennebec R. R., 45 Me. 547; Skowhegan Bank v. Farrar, 46 Me. 293; Bowker v. Hill, 60 Me. 172; Perry v. Coates, 9 Mass. 537; Lupton v. Cutter, 8 Pick. 298; Lane v. Felt, 7 Gray, 491; Hancock v. Colyer, 99 Mass. 187; Knight v. Bowley, 117 Mass. 551; New Hampshire Co. v. Platt, 5 N. H. 193; Fletcher v. Fletcher, 7 N. H. 452; Moore v. Pillow, 8 Humph. 448; Price v. Brady, 21 Tex. 614; Taylor v. Gillean, 23 Tex. 508; Tirrell v. Canada, 25 Tex. 455; Ellison v. Tuttle, 26 Tex. 283; Scofield v. White, 29 Vt. 330; Van Amee v. Jackson, 35 Vt. 173; Fuller v Jewett, 37 Vt. 473, *accord*.

Sheets v. Culver, 14 La. 449; Erwin v. Commercial Bank, 3 La. An. 186; Minn. Stat. c. 66, § 155; Gaffney v. Bradford, 2 Bail. 441, *contra*.

Bank-notes, however, may be taken on trustee or garnishee process, like ordinary chattels. Morrill v. Brown, 16 Pick. 173; Wildes v. Nahant Bank, 20 Pick. 352 (*semble*); Lovejoy v. Lee, 35 Vt. 480.

A consequence of holding that bills and notes are not goods and chattels of the holder so as to be reached by trustee or garnishee process against one in whose possession they are, is, that the property held by the principal debtor in the form of negotiable paper is practically always beyond the reach of a creditor until after the paper has become due.

For although attempts may be made to charge the maker of negotiable paper as trustee or garnishee of the holder, such attempts must prove almost uniformly fruitless, it being held in some jurisdictions that trustee or garnishee process cannot be served upon the maker of negotiable paper before its maturity. Gregory v. Higgins, 10 Cal. 339 (*semble*); Code of Iowa, § 2990; Sheets v. Culver, 14 La. 449; Kimball v. Plant, 14 La. 511; Denham v. Pogue, 20 La. An. 195; Maine Rev. Stat. c. 86, § 55; Marrett v. Equitable Ins. Co., 54 Me. 537; Mass. Gen. Stat. c. 142, § 31; Greer v. Powell, 1 Bush, 489; Littlefield v. Hodge, 6 Mich. 326; Hubbard v. Williams, 1 Minn. 54; Minn. Stats. c. 66, § 153; Gaffney v. Bradford, 2 Bail. 441; Dane v. Pawlette, 3 Wis. 300.

And in other jurisdictions, that although the process may be served before the maturity of the paper, yet judgment cannot be given unless it be shown that the principal debtor continues to be the holder until after maturity, or unless it be shown that the actual holder has acquired the paper from the principal debtor with knowledge of the service of the trustee or garnishee process. Mills v. Stewart, 12 Ala. 90 (*semble*); Hall v. Baldwin, 31 Ala. 509 (*semble*); Leslie v. Merrill, 58 Ala. 322; Enos v. Tuttle, 3 Conn. 27; Culver v. Parish, 21 Conn. 408; Mims v. West, 38 Ga. 18; Burton v. Wynne, 55 Ga. 615; Ill. Rev. Stat. c. 62, § 15; Junction Co. v. Cleneay, 18 Ind. 161; Cleneay v. Junction Co., 26 Ind. 375; King v. Vance, 46 Ind. 246; McNeill v. Roache, 49 Miss. 486; 1 Wag. Mo. Stats. 664 (c. 65, § 8); Clough v. Buck, 6 Neb. 343; Myers v. Beeman, 9 Ired. 116; Ormond v. Moye, 11 Ired. 564; Shuler v. Bryson, 65 N. C. 201; Ludlow v. Bingham, 4 Dall. 47; Hill v. Kroft, 29 Pa. 186; Day v. Zimmerman, 68 Pa. 72; Adams v. Avery, 2 Pittsb. 77; Matheny v. Hughes, 10 Heisk. 401; Iglehart v. Moore, 21 Tex. 501; Kapp v. Teel, 33 Tex. 811; Howe v. Ould, 28 Gratt. 1.

By statute in New Hampshire and Vermont, the nature of negotiable paper is so far ignored that in the former State a trustee process upon the maker will prevail against a subsequent transfer to a holder for value without notice. Amoskeag Co. v. Gibbs, 28 N. H. 316. And in the latter State such process will prevail against even a prior transfer to an innocent holder for value, other than a bank, unless the holder gives notice of the transfer to the maker before the service of the process. Kimball v. Gay, 16 Vt. 131; Barney v. Douglass, 19 Vt. 98; Peck v. Walton, 25 Vt. 38. In Arkansas and Maryland, a rule similar to that of Vermont was adopted without the aid of a statute. Collier v. Hershey, 21 Ark. 482; Steuart v. West, 1 Har. & J. 536; Somerville v. Brown, 5 Gill, 390.

Where, by the law of the place of making, a purchaser for value without notice takes negotiable paper subject to the lien of a creditor in the garnishee process against the maker, while by the law of the place of transfer such holder acquires an unincumbered title to the paper, the law of the place of making governs. Hull v. Blake, 13 Mass. 153; Meriam v. Rundlett, 13 Pick. 511, 515 (*semble*); Simon v. Huot, 8 Hun, 378; Emerson v. Petridge, 27 Vt. 8; Worden v. Nourse, 36 Vt. 756. Conf Clark v. Conn Co., 35 Conn. 303; Smith v. Blatchford, 2 Ind. 184. — Ed.

HANDY v. DOBBIN.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1815.

[*Reported in* 12 *Johnson*, 220.]

IN error, on *certiorari*, from a justice's court. Dobbin sued out of the justice's court an attachment, under the 23d section of the twenty-five dollar act (1 R. L. 398), against the goods and chattels of Handy. due proof having been given that he had absconded. The constable returned that he had attached two five-dollar bank-bills of the goods of Handy. The justice gave judgment for the plaintiff below. The only error relied on was that these bills were not liable to be attached.

SPENCER, J., delivered the opinion of the court. There can be no doubt that the constable, under the attachment, could take any goods and chattels which could be levied on by execution. The authority in both cases is the same. Bank-bills are treated, *civiliter*, as money: a tender in them is good, unless it be specially objected to at the time. The question, then, is narrowed to this: Can money be levied on by an execution? This court, in Williams *v.* Rodgers,[1] intimated strongly their concurrence in the decision of the Supreme Court of the United States on this point. In that case (1 Cranch, 133), all the cases on the point were reviewed, and it was held that money could be levied on. We now fully concur in the doctrine there advanced: we perceive no objection in principle why money should not be taken in execution. It is the goods and chattels of the party; and it appears to us to comport with good policy as well as justice to subject every thing of a tangible nature, excepting such things as the humanity of the law preserves to a debtor, and mere choses in action to the satisfaction of the debtor's debts. *Judgment affirmed.*[2]

[1] 5 Johns. 167.

[2] State *v.* Taylor, 56 Mo. 495; Spencer *v.* Blaisdell, 4 N. H. 198; Crane *v.* Freese, 1 Harr. 305; Holmes *v.* Nuncaster, 12 Johns. 395; Prentiss *v.* Bliss, 4 Vt. 513, *accord.*

Knight *v.* Criddle, 9 East, 48, *contra.*

But, at common law, bonds, bills of exchange, and promissory notes other than bank-notes could not be taken on execution. Byles, Bills, 11th ed. 8; Edwards *v.* Young, 11 Q. B 33, 38; Field *v.* Lawson, 5 Ark. 376; McGehee *v.* Cherry, 6 Ga. 550; McClelland *v.* Hubbard, 2 Blackf. 361; Johnson *v.* Crawford, 6 Blackf. 377; Smith *v.* Kennebec R.R., 45 Me. 547; Ingalls *v.* Lord, 1 Cow. 240; Rhoads *v.* Megonigal, 2 Barr, 38; Moore *v.* Pillow, 8 Humph. 448; Ellison *v.* Tuttle, 26 Tex. 283. In Edwards *v.* Cooper, *supra*, Lord Denman said, p. 38: "Bills of exchange were always

SOLOMON T. BRIDGES, PLAINTIFF IN ERROR, *v.* THE MAYOR AND COUNCIL OF GRIFFIN, DEFENDANT IN ERROR.

IN THE SUPREME COURT, GEORGIA, AUGUST TERM, 1861.

[*Reported in* 38 *Georgia Reports*, 118.]

BY THE COURT, LYON, J., delivering the opinion.[1] We think that the court below should have sustained the *certiorari*. The tax assessed by the Mayor and City Council of Griffin on the amount of solvent notes returned by the plaintiff in error, on persons residing out of the city of Griffin, was not authorized by the charter of the city, and was, therefore, illegal. By the charter, the Mayor and City Council can only levy and collect a tax on that property which is within the city. It is true, that debts, due by note, on account, or otherwise, is property within the sense of that charter, and of the general statutes of the State; but unless the persons who owe the debts reside in Griffin, they are not property within the city. The fact that the owner of these debts resides in the city, and has the notes there, does not alter the fact. The notes are but the evidences of the debt, while the debt itself is out of the city, as a man's title-deeds or bill of sale are the evidence of the owner's right of property in his land and negroes; and it would never be thought that land and negroes, out of the city, would be liable to the city taxes because the owner resided in the city, and kept his title-deeds there.

Let the judgment be reversed.[2]

chattels, though not liable to be taken in execution till after Stat. 1 & 2 Vict. c. 110. By this statute, money, bank-notes, checks, bills, and promissory notes, with all securities for money, may be seized under a writ of *fieri facias*." Similar legislation has taken place in many of the States of this country. See also Pelham *v.* Way, 15 Wall. 196; Brown *v.* Kennedy, 15 Wall. 591, for decisions under the Act of Congress, July 17, 1862, relating to the confiscation of the property of rebels. — ED.

[1] The facts of the case sufficiently appear in this opinion. — ED.

[2] People *v.* Home Co., 29 Cal. 533; Wilcox *v.* Ellis, 14 Kas. 588; State *v.* St. Louis, 47 Mo. 594; British Co. *v.* Commissioners, 1 Keyes, 303; Maltby *v.* Reading R. R., 52 Pa. 140; Susquehannah Co. *v.* Commonwealth, 72 Pa. 72; Catlin *v.* Hull, 21 Vt 152, *accord*.

In State *v.* Howard Co., 69 Mo. 454, it was held, and in the first four cases above cited, as also in State Tax on Foreign Bonds, 15 Wall. 300, 323, 324, and People *v.* Trustees, 48 N. Y. 390, 397, it was stated extra-judicially, that the holder's property in a bill or note is properly taxable only at the place where the instrument itself is, regardless of the residence of the holder or debtor. See, also, People *v.* Commissioners, 4 Hun, 595.

In Hunter *v.* Supervisors, 33 Iowa, 376; Johnson *v.* City Council, 2 Oreg. 327; 3 Oreg. 13, s. c., it was held that the property in a bill or note should be taxed at the residence of the holder. See, also, City Council *v.* Dunbar, 50 Ga. 387. — ED.

ALBERT B. SHELDON, APPELLANT, v. JOHN L. PARKER, RESPONDENT.

IN THE SUPREME COURT, NEW YORK, JANUARY TERM, 1875.

[*Reported in* 3 *Hun*, 498.]

APPEAL from a judgment of the County Court, in favor of the defendant, entered upon the trial of this action by the court without a jury.

This action was brought to recover the amount of a promissory note. It was commenced in a justice court, where a judgment was rendered in favor of the plaintiff, for ninety-two dollars, damages and costs, from which an appeal was duly taken to the County Court, where the cause was retried by the court without a jury. The note was given for eighty-seven dollars, dated December 1st, 1871, and was payable to Samuel F. Hawley or order, four months from date, and was duly transferred by Hawley to the plaintiff, for a valuable consideration, before maturity.

The judge who tried the cause found that, on the 22d day of March, 1871, and before the maturity of said note, the payee agreed in writing to sell and assign said note to Hiram Parker, and the said Hiram Parker agreed to purchase the same for fifty cents on the dollar; that before and at the time of the indorsement and delivery of said note to the plaintiff, the said plaintiff well knew of the agreement for the sale and transfer of said note by said Hawley to the said Hiram Parker. The judge held that said plaintiff was not a *bona fide* holder of the note, and the indorsement and delivery to him passed no title; that the title to said note passed to said Parker upon the execution of the agreement of Hawley to sell the same to him, and that such agreement operated as a present sale of said note. He dismissed the complaint, and directed judgment for the defendant accordingly, which was duly perfected, and the plaintiff thereupon appealed to this court.

Levi Brown, for the appellant.

L. B. Sessions, for the respondent.

E. DARWIN SMITH, J. The judgment rendered by the county judge, we think, was not erroneous. The contract of sale of said note to Hiram Parker was complete, — was in writing, and binding upon the parties, and not affected by the Statute of Frauds.

It is quite clear by the laws of England that the sale of a specific

chattel passes the property therein to the vendee without delivery.[1] In Gilmore v. Supple,[2] Sir Cresswell Cresswell, in giving the opinion of the court, said that, "by the laws of England, by a contract for the sale of specific, ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown that such was not the intention of the parties."

By the Statute of Frauds, a contract for the sale of goods and chattels exceeding fifty dollars, valid at common law, is declared invalid, without delivery and acceptance, or payment of the whole or some part of the purchase-money, unless it is in writing.[3] Shindler v. Houston.[4] In this case, the contract was for the sale of a specific article: nothing was to be done to perfect it before delivery. The vendor was entitled to the price, and the vendee to the delivery of the note. It was a case of perfect bargain and sale at common law, and the title passed to the vendee. The plaintiff, as held by the judge, acquired no title to the note. Hawley had no title to it to sell; and the plaintiff, having full knowledge of the facts, could acquire none.

The judgment was correct, and should be affirmed.

Judgment affirmed.[5]

[1] 1 Chitty on Contracts, 11th Am. ed. 518; 2 Story on Contracts, § 1018; Benjamin on Sales, Book 2, c. 11, p. 226 (2d ed.).

[2] 2 Moore's Privy Council Cases, 556.

[3] Bills and notes have been held to be "goods, wares, or merchandise" within the Statute of Frauds. Baldwin v. Williams, 3 Met. 365; Somerby v. Buntin, 118 Mass. 279.

Bills and notes are "goods and chattels" within the statute of James (21 Jac c. 19). Hornblower v. Proud, 2 B. & Al. 327, 334.

So also a fraudulent delivery of a bill or note is an act of bankruptcy within 12 & 13 Vict. c. 106, § 67, and 6 Geo. IV. c. 16, § 3, relating to fraudulent delivery of "goods and chattels." Cumming v. Baily, 6 Bing. 371; Edwards v. Cooper, 11 Q. B. 38. — Ed.

[4] 2 Comst. 261.

[5] Nininger v. Banning, 7 Minn. 274, *accord*. — Ed.

SECTION VI.

A Bill and Note, like a Bond, may take effect, by Relation, after the Death of the Contracting Party.

JANE I. DEAN *v.* WILLIAM W. CARRUTH, ADMINISTRATOR.

IN THE SUPREME JUDICIAL COURT, MASSACHUSETTS, OCTOBER TERM, 1871.

[*Reported in* 108 *Massachusetts Reports*, 242.]

CONTRACT, brought November 25, 1870, against the administrator of the estate of Samuel C. West, on the following promissory note made to the plaintiff by the intestate: —

"TAUNTON, August 15, 1857.

"For value received I promise to pay Mrs. Jane I. Baylies five hundred dollars on demand. SAMUEL C. WEST.

"Witness: A. E. SWASEY."

The answer alleged that the note was void for want of consideration.

At the trial in the Superior Court before Scudder, J., the plaintiff produced the note, and the defendant admitted that it was in fact signed and witnessed as it purported to be: whereupon the plaintiff rested her case.

The defendant then put in evidence certain interrogatories to the plaintiff, and her answers thereto, by which it appeared that the plaintiff's maiden name was Richmond; that before 1847 she was married to Alfred Baylies, who died in that year, and in 1867 she was married to her present husband, Gaius Dean; that West was never married, and died in 1869; that during the plaintiff's widowhood she followed the occupation of a needlewoman, and lived in Taunton, where West also resided part of the time; that she had known West all her life, and was connected with him by marriage, her father, after a previous marriage of which she was the issue, having married West's sister; that, at or about the time of the date of the note, Swasey (the witness of the note) handed her a sealed envelope, on the outside of which was written: "Mrs. Jane I. Baylies. I do not wish you to open this until my decease. S. C. W.;" that she opened the envelope for the first time after West's death, and found therein a piece of paper, on the upper part of which the note was written, and on the lower part these words: "August 15, 1857. Dear Jane, — Please

accept the above from your true friend, S. C. W.;" and that she gave notice of the note to West's administrator, immediately after his appointment.

It further appeared by the interrogatories and answers that during a portion of the time while West resided at Taunton he employed the plaintiff to make his underclothes and mend his clothes, and she did so; that he boarded there at a hotel, but frequently took meals at the plaintiff's house, prepared by her, and for seven years was accustomed to eat supper there on Sundays; that he came to her house almost every evening for an hour or two, and played with her children; that he occasionally gave her children small sums of money for services done for him, as, for instance, to her two boys five cents each on Sunday evenings for coming for him to go to her house to supper; that he occasionally made gifts of small value to the plaintiff, as, for instance, of a coal-scuttle and a picture of Faith, the former at Christmas; and that he always paid her for the underclothes which she made for him; but the plaintiff was unable, after such a lapse of time, to state the times or amounts of such payments. It did not distinctly appear by them what part of the period between the death of the plaintiff's first husband in 1847 and her second marriage in 1867 was covered by West's residence in Taunton, nor what relation in time the date of the promissory note bore to that residence, or to the services rendered by her to him; and it appeared that West died in a lunatic hospital in South Boston.

The plaintiff then called a witness to the fact that West had no relatives by blood in Taunton, nor any connection by marriage there nearer than the plaintiff; and this closed the evidence.

The defendant thereupon requested the following among other rulings: "That, upon the whole evidence, the plaintiff cannot maintain this action, because the evidence shows that the note was given as a gift to the plaintiff; and there was no valuable consideration therefor."

The judge refused so to rule, and submitted the case to the jury, who returned a verdict for the plaintiff; and the defendant alleged exceptions. The interrogatories and answers, of which the substance is given above, were annexed in full to the bill of exceptions.

R. D. Smith & W. W. Carruth, for the defendant.

C. I. Reed (*J. H. Dean* with him), for the plaintiff.

COLT, J. All the evidence upon which this case was submitted to the jury is reported. The court was asked to rule at the trial, as matter of law, that the plaintiff could not maintain the action upon this evidence, on the ground that no consideration was shown for the note declared on; and exception is taken to the refusal so to rule. Under instructions which were not otherwise objected to, the jury

found for the plaintiff; and the verdict must stand, unless we can say, as matter of law, that there was no evidence in the case to warrant it.

The weight or sufficiency of the evidence is not here to be considered as upon a motion for a new trial. The question, upon exceptions so taken, is whether there is any evidence, however slight, upon which a verdict could be legally rendered for the plaintiff. If there is, it is enough, although contradicted and apparently controlled by the other evidence in the case. Forsyth *v.* Hooper,[1] Robbins *v.* Potter.[2]

In an action upon a promissory note, whether negotiable or not, the plaintiff sustains the burden of proof by producing the note and proving its execution. It is evidence, under the hand of the promisor, of a contract made upon a good consideration, even if the words "value received" are omitted. Townsend *v.* Derby,[3] Burnham *v.* Allen.[4]

In the opinion of the court, the evidence thus afforded in the case at bar, by the production of the note, is not defeated in its effect by the words, "Dear Jane, — Please accept the above from your true friend, S. C. W.," which were written upon the lower part of the paper upon which the note was written. We cannot say, as matter of law, that these words show the note to have been only a gift. They are consistent with a purpose to make it a more liberal compensation for services rendered than the plaintiff had expected, or a desire on the part of the maker to have it accepted instead of the money. Nor is the request, indorsed upon the envelope in which the note was sent, that it should not be opened until the maker's decease, decisive upon the question whether there was a valuable consideration. Nor do these memoranda, with the note so delivered, constituting one transaction and construed together, as a matter of legal intepretation signify that the note was a mere gift.

The other evidence upon which the defendant relies is found in the plaintiff's answers to interrogatories filed and put into the case by the defendant. In these interrogatories, she is not directly asked as to the consideration, but is inquired of as to her relations with the defendant's intestate during his life, which are gone into with some detail; and from her answers no doubt there is room for argument that the note was a mere gift. On the other hand, there are statements from which it may be inferred that some of the work, done by her at his request, was never paid for in any other way. If the jury were satisfied, upon the whole case, including the note itself, that it was given in payment for services rendered, however disproportioned in value, then their verdict was right.[5] Inadequacy of consideration, without fraud,

[1] 11 Allen, 419. [2] 98 Mass. 532. [3] 3 Met. 868. [4] 1 Gray, 496.

[5] Worth *v.* Case, 42 N. Y. 362; Earl *v.* Peck, 64 N. Y. 596, *accord*. See Canfield *v.* Ives, 18 Pick. 253. — Ed.

is no defence. There was no error in declining to give the instruction asked. *Exceptions overruled.*[1]

[1] In Worth v. Case, 42 N. Y. 362, the maker of a note placed it in a sealed envelope, upon which was written, "Mary C. Worth, this is not to be unsealed while I live, and returned to me any time I may wish it. T. B. Worth," and delivered the envelope to the plaintiff, who did not open it until after the death of the maker. It was held that the plaintiff might maintain an action upon the note against the executors of the maker. Foster, J., delivering the opinion of the majority of the court, said, p. 367: —

"There is no doubt that a delivery of a deed or note, or other obligation, to one person in favor of, and for the benefit of another, constitutes a valid and binding delivery as against the party who delivers it, whether the party in whose favor it is delivered is owner of it or not; and, for the purpose of protecting his interests, the law holds the party receiving the delivery as his trustee, and makes his acceptance of it the acceptance of the beneficiary. And this, too, whether the person receiving the delivery knows the contents of the instrument or not, and whether he does any thing more than merely receive it or not. And yet, where the person in whose favor the instrument is executed will be injured by the acceptance of it, the delivery to such third person does not bind him, unless he authorized such acceptance or adopts it by some subsequent act.

"The same is the case with an instrument executed and delivered personally to an idiot or lunatic. If beneficial to him, the party executing it is bound by it, and the idiot or lunatic is entitled to its benefits; but, if against his interests, he is not bound, although he has received the delivery. In these cases, the delivery is held good, though the grantee or obligee really had nothing to do with the transaction, in order to carry out the intent of the party who executed the instrument, and for the benefit of the party for whose benefit it was delivered, and constitutes an acceptance on his part, when for his interest to do so, and not when otherwise.

"Upon what principle is it, then, that a direct delivery of an obligation to the obligee himself, and a reception thereof by him, does not constitute an acceptance, if the contents of the instrument delivered are not at the time known to him?

"And why may not a party deliver an instrument, the contents of which are not known to the party receiving it, with the like effect as if it were, without his knowledge, delivered for his benefit to some third person for him?

"Or suppose that on the 30th day of January, 1864, Theron B. Worth had been indebted to the plaintiff in the exact sum of $10,000; and had on that day delivered the note in question precisely as he did; and it had remained in the possession of the plaintiff as it did, till his death, is it possible that the plaintiff could not maintain an action on the note, and that she would have been compelled to count on the original indebtedness? To my mind, the delivery and acceptance were more complete than in any of the other cases to which I have alluded."

A note delivered as an escrow takes effect immediately upon the performance of the condition of the escrow, without a subsequent delivery to the payee. Couch v. Meeker, 2 Conn. 302; Taylor v. Thomas, 18 Kas. 217. See Walsh v. Kenedy, 9 Phila. 178. — Ed.

SECTION VII.

A Party to a Bill or Note is not a Guarantor within the Statute of Frauds.

O'DONNELL v. SMITH.

IN THE COURT OF COMMON PLEAS, NEW YORK, MAY, 1858.

[*Reported in 2 E. D. Smith*, 124.]

APPEAL by the defendant from one of the district courts.

BY THE COURT, WOODRUFF, J. This action is brought upon a promise in writing, made by the defendant, in substance as follows: —

"Nov. 14th, 1851.

"Mr. Peter Smith, bo't of J. O'Donnell,

"Nov. 14th and Nov. 11th. (Specifying items.) $37.70."

Underneath which was a request, signed by the debtor, Peter Smith, to pay the above and charge to his account, to which was added: —

"I promise to pay the above on or before Saturday, 22d Nov., 1851.

(Signed) "T. W. SMITH."

The plaintiff proved on the trial, by the drawer of the order, Peter Smith, that he drew the order upon the defendant, and that the signature to the promise thereunder written was in the defendant's handwriting; and the justice rendered judgment for the plaintiff. The defendant appeals.

The only ground of appeal assigned by the appellant — and to which our attention is now directed — is that the defendant's promise was a promise to pay Smith's debt; and, there being no consideration expressed in it, it is void by the Statute of Frauds. 2 Rev. Stat. 136, § 2.

To dispose of this ground of appeal, it is only necessary to refer to Leonard *v.* Mason, in which a parol acceptance of an order written beneath a note, in this language, "Please pay the above note, and hold it against me in our settlement," was held to constitute a valid contract, on the ground that the order was, in legal effect, a bill of exchange, and therefore the promise to pay was not within the statute.

The above order must therefore be deemed a bill of exchange, and the written promise of the defendant is a sufficient acceptance.

The judgment must be affirmed, with costs.[1]

[1] Jarvis *v.* Wilson, 46 Conn. 90; Nelson *v.* First Bank, 48 Ill. 36; Laflin *v.* Sinsheimer, 48 Md. 411; Strohecker *v.* Cohen, 1 Speers, 349; Fisher *v.* Beckwith, 19 Vt. 81, *accord* — ED.

CASEY v. BRABASON.

IN THE SUPREME COURT, NEW YORK, SPECIAL TERM, APRIL, 1860.

[*Reported in* 10 *Abbotts' Practice Reports*, 368.]

MOTION for a new trial.

This action was brought upon a promissory note, in the words and figures following, to wit: —

"$200.

"On or before two years, we jointly and severally promise to pay to Michael Casey, or his order, the sum of two hundred dollars. Given under our hands,

"JANUARY 8, 1856.

(Signed) "BERNARD MCCABE,
"*Catholic Pastor.*
"CHARLES J. BRABASON."

The defendant alleged in his answer that he signed the note as surety, and without consideration.

The proof showed that the note was given for a debt of McCabe's, and that the defendant signed it as his surety, without receiving any consideration therefor.

The defendant insisted that he was not liable; but the judge held otherwise, and directed the jury to find for the plaintiff, to which decision and direction the defendant excepted. The jury rendered a verdict in favor of the plaintiff for $229.10.

The action was tried at the Chenango circuit in February, 1860.

Defendant moved for a new trial on a case and exceptions.

The other points in the case need not be stated, as they were not deemed of sufficient importance for examination.

William H. Hyde, for plaintiff.

Horace Packer, for defendant.

BALCOM, J. The instrument in question is a valid promissory note; although it does not contain the words "for value received," or any words tantamount to them. Edwards on Bills and Promissory Notes, 56, 78; 1 Cow. 2d ed. 163.

The defendant's counsel does not deny but that McCabe was liable on the note; but he contends that the defendant is not liable on it, because he signed it as surety, and did not receive any consideration therefor. He insists that the Statute of Frauds applies to the case, and exempts the defendant from the payment of the note. The statute is that "every special promise to answer for the debt, default, or miscarriage of another" shall be void, unless the agreement containing

such promise, or some note or memorandum thereof expressing the consideration, be in writing and subscribed by the party to be charged therewith. 2 Rev. Stat. 135, § 2.

McCabe owed the plaintiff the money mentioned in the note; and the defendant, though in fact a mere surety, signed the note as principal, with McCabe. The note, therefore, was not a special promise by the defendant to answer for the debt, default, or miscarriage of McCabe.

I think the debt, for which the note was given, a sufficient consideration to uphold the note against the defendant as well as McCabe. The note, on its face, is an original undertaking of both of them.

If the defendant had indorsed the note for the accommodation of McCabe, instead of signing it as maker, he would clearly have been liable on it, if it had been duly protested for non-payment;[1] and I am unable to see why he is not liable on it as maker.

I am of the opinion that the Statute of Frauds does not apply to the case, and that the jury were properly directed to find a verdict in favor of the plaintiff for the amount of the note.

The point that the defendant supposed he was only signing his name to the note as a witness when he wrote it is untenable; for his answer concedes he signed it as surety.

I think there was no question for the jury upon the evidence; and that the defendant's motion for a new trial should be denied, with $10 costs.[2]

[1] Turnbull v. Trout, 1 Hall, 336; Zellweger v. Caffe, 5 Duer, 87; Nelson v. Richardson, 4 Sneed, 307, *accord*. — Ed.

[2] Paul v. Stackhouse, 38 Pa. 302, *accord*. — Ed.

CHAPTER IX.

CHECKS.

MARZETTI v. WILLIAMS AND OTHERS.

IN THE KING'S BENCH, NOVEMBER 18, 1830.

[*Reported in* 1 *Barnewall & Adolphus*, 415.]

DECLARATION stated that the plaintiff, long before and at the time of the committing of the grievances thereinafter mentioned, was, and from thence hitherto had been, a trader, to wit, a wine-merchant and a ship and insurance agent, and the trades and businesses of a wine-merchant and ship and insurance agent used, exercised, and carried on, and still used, &c., to wit, at London. That the defendants, before and at the time of committing the grievance by them thereinafter next mentioned, were, and still were, bankers, and the trade and business of bankers used, exercised, and carried on, and still used, &c., in the city of London, to wit, at, &c.; and, as such bankers, had been used to receive and take into their charge moneys, bills, notes, and other securities of divers persons, customers of and dealing with the defendants in the way of their trade and commerce in the city of London. That, by the usage and custom of trade and commerce in the city of London, persons being bankers, and using the trade and business of bankers within the city of London, and receiving into their care and custody the moneys, bills, notes, and securities of persons being the customers of or dealing with such persons as bankers as aforesaid in the way of their trade and business of bankers, and having in their hands cash balances of such their customers and persons dealing with them as aforesaid, and not having lent or advanced money to discount any bills or bill, notes or note, or other negotiable securities, or made any advances, or incurred or entered into any engagements or contracts, or incurred or subjected themselves to any liabilities for or on account of such their customers or persons dealing with them as bankers as aforesaid, nor having any lien or claim on such cash balances, were bound, and it had been and was their duty as bankers as aforesaid to honor and pay the drafts or checks of such their customers and persons dealing with them, duly drawn for any part of such cash balances, when duly presented to such bankers for payment by any person or persons

lawfully entitled to recover the money specified in such drafts or checks. That long before, and at the time of committing the grievance by the defendants thereinafter next mentioned, plaintiff was a customer of and dealt with the defendants in the way of their said trade and business of bankers, and at the time of committing the grievance, &c., had in their hands, as such bankers as aforesaid, a large cash balance, and much more than sufficient to pay and discharge the money specified in the draft or order thereinafter next mentioned, to wit, a cash balance of £109 19*s.* 6*d.*, and defendants had not lent or advanced to the plaintiff any money, nor discounted any bills or bill, notes or note, or other negotiable securities for, nor made any advances, nor entered into any engagements or contracts, or incurred or subjected themselves to any liabilities for or on account of the plaintiff, who was so a customer of and dealt with them as bankers as aforesaid; nor had they, or any of them, any lien or claim on the said cash balance of the plaintiff so being in their hands as aforesaid. That whilst such cash balance was in the hands of the defendants as his bankers as aforesaid, to wit, on the 18th of December, 1828, to wit, at London aforesaid; the plaintiff, according to the usage and custom of merchants, made and drew his certain draft or order in writing for the payment of money commonly called a check on a banker, bearing date the day and year last aforesaid, and then and there directed the said draft or order to the defendants, and thereby required them to pay to certain persons by the names, style, &c., of Sampson & Hooper, or bearer, £87 7*s.* 6*d.*, the said sum of £87 7*s.* 6*d.*, specified in the said draft or order, being a less sum than the said cash balance of the plaintiff, so being in the hands of defendants as his bankers as aforesaid, and then and there delivered the said draft or order to the said Sampson & Hooper, who thereby then and there became and were the bearers thereof, and from thence until and at the time of the presentment and refusal thereinafter next mentioned were lawfully entitled to the money therein specified. That afterwards, and whilst such cash balance of plaintiff, which so exceeded the said sum of £87 7*s.* 6*d.* in the said draft or order mentioned, was in the hands of the defendants as his bankers as aforesaid, to wit, on, &c., at, &c., the said draft, &c., was duly presented for payment. Yet, the defendants, not regarding their duty as such bankers as aforesaid, nor such usage and custom of trade as aforesaid, but contriving, &c., to injure the plaintiff in his credit and character as a trader, to cause it to be believed that he had drawn a draft or order upon them without having effects in their hands to pay and answer the same, &c., did not, nor would, when the said draft or order was so shown and presented to them for payment as aforesaid, honor the said draft or order, or pay to the said Sampson & Hooper, or either of them, the said sum of

£87 7*s.* 6*d.* therein specified, but wholly refused so to do. The second count stated that the defendants were the plaintiff's bankers, and as such had been used to pay his checks; and that at the time, &c., they, having sufficient money of his in their hands, and no lien or other lawful cause of refusal, did refuse to pay, &c., contrary to their duty as such bankers, and maliciously intending to injure the plaintiff. The third count stated the facts still more concisely; and there was a general averment of damage to the plaintiff's circumstances and credit. A count was added in trover for bank-notes and pieces of money. Plea: not guilty. At the trial before Parke, J., at the London sittings after Michaelmas term, 1829, it appeared that the plaintiff was a wine-merchant and ship-broker, that the defendants were bankers in London, and that the plaintiff kept a banking account with them. The amount of the balance due from the defendants to the plaintiff, on the evening of the 17th of December, 1828, was £69 19*s.* 6*d.* A few minutes before eleven o'clock on the morning of the 19th, a further sum of £40, being a Bank of England note, was paid in to his account. On the same day, about ten minutes before three o'clock, a check drawn by the plaintiff in favor of Messrs. Sampson & Hooper, for £87 7*s.* 6*d.*, was presented at the banking-house of the defendants for payment. The clerk to whom it was presented, after having referred to a book, said there were not sufficient assets, but that the check might probably go through the clearing-house. The check was paid on the following day. Upon this evidence, it was contended by the attorney-general, first, that the plaintiff, having declared in tort as for a breach of duty, must be nonsuited, inasmuch as he had not proved any damage. Secondly, that a banker was not bound to know that a particular sum had been paid in an hour or half an hour before the check of his customer was drawn. He must be allowed a reasonable time to ascertain the state of the account between him and them; and it was not to be supposed he could know without special notice that a sum paid in by a customer was to be drawn out an hour or two afterwards. The state of the account, in point of practice, being generally ascertained at the close of each day when the books were made up, it could only be expected that the clerk should look at the book at the time when the check was presented, and give an answer according to the state of the account as it then appeared. The learned judge was of opinion that a banker who received a sum of money belonging to his customer became his debtor the moment he received it, and was bound to pay a check drawn by such customer after the lapse of such a reasonable time as would afford an opportunity to the different persons in his establishment of knowing the fact of the receipt of such money, and that the refusal to pay a check under such circumstances was a breach

of duty for which an action would lie; and he directed the jury to find for the plaintiff, if they were of opinion that such a reasonable time had intervened between the receipt of the money at eleven o'clock and the presentment of the check at three, observing also that it could not be expected if a sum of money was paid to a clerk in a large banking office, and immediately afterwards a check presented to another clerk in a different part of the office, that the clerk to whom the check was presented should be immediately acquainted with the fact of the cash having been paid in, but a reasonable time must be allowed for that purpose; and he told the jury that, in forming their judgment whether such a reasonable time had elapsed, they must consider whether the defendants ought or ought not, between eleven and three o'clock, to have had in some book an entry of the £40 having been paid in, which would have informed all their clerks of the state of the account. The jury having found for the plaintiff on the first three counts, the attorney-general asked whether they found that the defendant acted maliciously. The learned judge said there was no evidence of malice in fact; and, if malice was a question for the jury, they must be taken to have negatived malice. A rule *nisi* for a new trial was obtained.

Brougham & Thesiger showed cause. The case was left to the jury most favorably for the defendants. They became debtors to the plaintiff the moment they received his money, and were bound to pay that debt. They refused, therefore, at their peril to honor the check. Assuming, however, that they were not bound to do so until a reasonable time had elapsed after the plaintiff had paid in the £40, the jury have found that, at the time when the check was presented, a sufficient interval had elapsed to enable the defendants and their clerks to know that that sum had been paid in. After verdict, the defendants must be taken to have known at the time when they refused the check that they had in their hands funds belonging to the plaintiff. Their refusal to pay it, therefore, was a wrongful act, the obvious and immediate tendency of which was injurious to the character of the plaintiff in his trade. It may be conceded that, in order to support an action, the consequences of any wrongful act must be to occasion some injury or loss to the plaintiff; but it is not essential, to support such an action, for the plaintiff to show damage in fact: it is sufficient if he sustain a damage in law. In many instances, the law, from the injurious nature of the wrongful act, presumes damage. Thus, the mere publication of slander in certain cases is deemed to be injurious, and to confer a substantive right of action, though no special loss or damage can be shown, upon the principle that the obvious and immediate consequence of the words uttered is to produce damage to the person of whom they are spoken. One among other instances is where words

are spoken of a man in his trade or profession. In that case, the law presumes damage from the obvious tendency of the slander. The act done by the defendants in this case was wrongful, and in its tendency was injurious to the credit of the plaintiff. Upon principle, therefore, the action is maintainable without showing any special damage. If the defendants had said of the plaintiff that he was not worthy to be trusted for £80, an action might have been maintained against them; and it would not have been necessary to allege any special damage. The circumstance of the jury having negatived malice makes no difference; for the refusal to pay the check was wrongful, and therefore, in a legal sense, malicious. It was not necessary to show malice in fact. See Bromage *v.* Prosser.[1]

Sir James Scarlett, Attorney-General, *Campbell*, *Justice*, and *Williams*, contra. The action, being brought in tort for a breach of duty, and not for a breach of contract, was not maintainable without showing special damage. The general principle is that, in order to maintain an action, there should be a damage to the plaintiff, the consequence of a wrongful act by the defendant. In those cases of slander where words are actionable in themselves, the law presumes malice as well as that a damage ensues from the obvious tendency of the slander; but in other cases, where the words *per se* are not of that injurious tendency, actual damage must be proved. Here the jury have negatived malice; and, although the refusal by a banker to pay the check of his customer may under circumstances be injurious, it is not necessarily so: actual damage, therefore, must be shown, and in this case none appeared. An action of tort lies where a man has a temporal loss or damage by the wrong of another. Com. Dig. Action on the Case. But a mere breach of duty without any damage is no ground of action. A person who drives his carriage on the wrong side of a public highway is guilty of a wrongful act; but he is not liable to an action, unless he occasion actual damage to another. In Burnett *v.* Lynch,[2] it was held that a lessee who by deed poll had assigned his interest to A, subject to the performance of covenants contained in the lease, might maintain an action of tort against A for having neglected to perform the covenants to paint and repair during the time he continued assignee, whereby the lessee was subjected to an action of covenant at the suit of his lessor, and had to pay damages. In that case, there was an actual damage. But suppose the covenant had been broken, but the repair, &c., done before any action of covenant was brought, the lessee could not have maintained his action of tort without showing actual damage. If a right of action vests in such a case as the present, the moment a check is refused, great inconvenience will ensue; for if there

[1] 4 B. & C. 247. [2] 5 B. & C. 589.

be once a refusal, though it be countermanded within the next minute, the drawer may support an action, and subject the banker to the payment of costs. [PARKE, J. The action here is in form tort; but it is in substance founded on a contract by the banker to pay the checks of his customers, when the latter has funds in his hands. Upon breach of that contract, a right of action vests without any special damage.] Where there is an express contract, a party may recover for a breach of it without showing actual damage, Van Wart *v.* Woolley;[1] but there is no authority for saying that he may so recover for the breach of an undertaking implied by law.

LORD TENTERDEN, C. J. I think that the plaintiff is entitled to have a verdict for nominal damages, although he did not prove any actual damage at the trial. I cannot think there can be any difference, as to the consequences resulting from a breach of contract, by reason of that contract being either express or implied. The only difference between an express and an implied contract is in the mode of substantiating it. An express contract is proved by an actual agreement; an implied contract, by circumstances and the general course of dealing between the parties; but, whenever a contract is once proved, the consequences resulting from the breach of it must be the same, whether it be proved by direct or circumstantial evidence. The attorney-general was compelled to admit, in this case, that, if the action were founded on an express contract, the plaintiff would have been entitled to recover nominal damages, although no actual damage were proved. Now this action is, in fact, founded on a contract; for the banker does contract with his customer that he will pay checks drawn by him, provided he, the banker, has money in his hands belonging to that customer. Here that contract was broken; for the defendants would not pay the check of the plaintiff, although they had in their hands money belonging to him, and had had a reasonable time to know that such was the fact. In this case, a plaintiff might, for the breach of that contract, have declared in assumpsit. So in Burnett *v.* Lynch[2] the plaintiff might have declared as for breach of a contract. It is immaterial in such a case whether the action in form be in tort or in assumpsit. It is substantially founded on a contract; and the plaintiff, though he may not have sustained a damage in fact, is entitled to recover nominal damages. At the same time, I cannot forbear to observe that it is a discredit to a person, and therefore injurious in fact, to have a draft refused payment for so small a sum; for it shows that the banker had very little confidence in the customer. It is an act particularly calculated to be injurious to a person in trade. My judgment in this case however, proceeds on the ground that the action is founded on a

[1] 1 Moody & Malk. 520 [2] 5 B. & C. 589.

contract between the plaintiff and the bankers; that the latter, whenever they should have money in their hands belonging to the plaintiff, or within a reasonable time after they should have received such money, would pay his checks; and, there having been a breach of such contract, the plaintiff is entitled to recover nominal damages.

PARKE, J. I am of the same opinion. This action being substantially founded on a contract, I think it can make no difference whether it is in form tort or assumpsit. There is no authority for any such distinction. This case, therefore, must be considered as if the action were founded on a contract by the bankers to pay all drafts presented within a reasonable time after they receive such money, so as to allow them to pass it to their customer's account. It is admitted that, where there is a breach of an express contract, nominal damages may be recovered. The only difference, however, between an express and an implied contract is as to the mode of proof. An express contract is proved by direct evidence, an implied contract by circumstantial evidence. Whether the contract be proved by evidence direct or circumstantial, the legal consequences resulting from the breach of it must be the same: one is that, wherever there is a breach of contract or any injury to the right arising out of that contract, nominal damages are recoverable. An extreme case may be put, where a party, who had sustained no inconvenience, might bring an action; but the remedy in that case would be to deprive such party of costs.

TAUNTON, J. The defendants were guilty of a breach of duty, which duty the plaintiff at the time had a right to have performed. The jury have found that, when the check was presented for payment, a reasonable time had elapsed to have enabled the defendants to enter the £40 to the credit of the plaintiff, and therefore that they must or ought to have known that they had funds belonging to him. That was sufficient to entitle the plaintiff to recover nominal damages; for he had a right to have his check paid at the time when it was presented, and the defendants were guilty of a wrong by refusing to pay it. The form of the declaration, whether it be in tort or assumpsit, makes no substantial difference; nor can it be any real ground of distinction whether the foundation of the action be an express or an implied assumpsit. There are many instances where a wrong, by which the right of a party may be injured, is a good cause of action, although no actual damage be sustained. Trespass *quare clausum fregit* is maintainable for an entry on the land of another, though there be no real damage, because repeated acts of going over the land might be used as evidence of a title to do so, and thereby the right of the plaintiff might be injured. So an action may be maintained by a commoner for an

injury done to his common, without proving actual damage. See Mellor v. Spateman [1] and Young v. Spencer.[2] In Wells v. Watling,[3] which was an action by a commoner for surcharging the common the evidence was that the defendant, in the year 1777, turned on a greater number of sheep than he ought. There was no evidence that the plaintiff had turned on any sheep in that year. It was objected that the action was not maintainable, because the plaintiff, not having used the common during the period of the defendant's misfeasance, could not by possibility have sustained any damage. But it was held that the action was maintainable. Lord Chief Justice De Grey said that it was sufficient if the right be injured, whether it be exercised or not; and Nares, J., observed that, in the case of the dippers at Tunbridge Wells,[4] it was held that a probable damage was a sufficient injury on which to ground an action. Here, independently of other considerations, the credit of the plaintiff was likely to be injured by the refusal of the defendants to pay the check; and as it was the duty of the defendants to pay the check when it was presented, and that duty was not performed, I think the plaintiff, who had a right to its being performed, is entitled to recover nominal damages. The case put in argument, of the holder of a check being refused payment, and called back within a few minutes and paid, is an extreme case, and a jury probably would consider that as equivalent to instant payment. That, however, is not the present case. Here the refusal to pay was not countermanded till the following day.[5]

Patteson, J. I think the verdict was right. The action is in form founded in tort, but is in substance founded on a contract. The relation in which the parties stood to each other, viz. that of banker and customer, was created by their own contract, not by the general operation of law. Green v. Greenbank [6] shows that the circumstance of the action being in form for a tort is immaterial, if the substantial ground of it be a contract. This action, therefore, lies, if the plaintiff could have brought assumpsit; and, as it is quite clear that he could have maintained assumpsit for the breach of contract, he may, on the same ground, maintain this action of tort, unless there be some distinction in this respect between an express and an implied contract. But the only distinction between the two species of contracts is as to the mode of proof. The one is proved by the express words used by the parties, the other by circumstances showing that the parties in-

[1] 1 Saund. 345, note.
[2] 10 B. & C. 145, note.
[3] 2 Sir W. Black. 1233.
[4] 2 Wils. 414.
[5] An action on the case will lie for the possibility of a damage and injury: as, for persuading A not to come and sell his wares at the market of B, the lord of the market may have this action. *Per Curiam* in Weller v. Baker, 2 Wils. 422.
[6] 2 Marsh. 485.

tended to contract. As soon as it is made out, either by direct or circumstantial evidence, that there was such a contract, either of the parties may maintain an action against the other without showing any actual damage. The rule for entering a nonsuit must therefore be discharged. *Rule discharged.*[1]

T-730

SERLE v. NORTON.

AT NISI PRIUS, CORAM LORD ABINGER, C. B., DECEMBER 9, 1841

[*Reported in* 2 *Moody & Robinson*, 401.]

ASSUMPSIT by the holder of a banker's check for £20, drawn by defendant on Hulle & Co., bankers at Uxbridge, dated 19th March, 1841. There were also the usual money counts.

Pleas: 1. That the defendant did not make the check.

2. That the check was not duly presented.

3. Payment.

4. (As to the money counts) *non assumpsit.*

The check was drawn payable to one White, and there was evidence that it was drawn and issued by the defendant to White at Windsor, some days before that on which it bore date; and White, on the same day that he obtained possession of the check, paid it away to the plaintiff. The check was not presented until the 6th of April, on which day the plaintiff caused it to be presented to Hulle & Co. at Uxbridge, through Messrs. Glyn, bankers in London, who were correspondents of Hulle & Co. No cause was assigned for the check's not having been presented earlier.

Ball, for the defendant, besides contending that there was evidence of the check's being postdated, and therefore void, insisted, further, that it had not been presented within a reasonable time, and that the defendant was therefore entitled to a verdict on the second plea.

[1] Rolin v. Steward, 14 C. B. 595, *accord.*

When a bank has several branches, a customer can recover damages for the dishonor of those checks only which are drawn by him upon the branch where he keeps his account. Woodland v. Fear, 7 E. & B. 519; Gray v. Johnston, L. R. 3 H. L. 1; Prince v. Oriental Bank, 3 App. Cas. 825, *accord.* See Cumming v. Shand, 5 H. & N. 95.

Nor is such a bank bound to honor a check drawn upon a branch having sufficient funds to pay the check, unless the funds are sufficient also to offset any balance of account against the customer at any of the other branches of the bank. Garnett v. McKewan, L. R. 8 Ex. 10.

A bank is bound to honor its customer's notes or acceptances made payable at the bank in the same manner as his checks. Whitaker v. Bank of England, 1 C. M. & R. 744; Rolin v. Steward, 14 C. B. 595; Roberts v. Tucker, 16 Q. B. 560; Kymer v. Laurie, 18 L. J. Q. B. 218. — ED.

S. Temple, contra. There is no fixed rule as to the time within which bankers' checks must be presented. Here, there is no evidence of the bankers having failed, or that the defendant has sustained any loss by the plaintiff's delay in presenting the check. The check is drawn on a country banker; and some latitude must be allowed in such a case, beyond what would be reasonable time for presenting a check on a London banker. Even if the jury found the check to have been postdated, the plaintiff was still entitled to a verdict on the money counts.

Lord Abinger, C. B. If the jury think that the check was postdated, it is void, and the defendant will be entitled to a verdict on the first plea. The only doubt is whether such a defence be open to the defendant on the first plea. In regard to the money counts, I think there is no such privity between the parties as will entitle the plaintiff to a verdict on those counts. If, however, the plaintiff think he can make any thing of these points, I will give him leave to move. As to the other defence, the question is one for the jury, whether, under the circumstances of the case, the check was presented within a reasonable time; for that is all which, in the case of bankers' checks, the law requires. It is reasonable to allow some little space of time in the case of checks on country bankers, beyond what is usual in the case of London bankers. If, indeed, any loss had been sustained by the defendant through the non-presentment at an earlier period, that might have made a difference. The jury must form their own conclusion; but I do not myself see any sufficient ground for saying that the lapse of time in this case necessarily involves any laches.

Verdict for the defendant on the first and last pleas; for the plaintiff on the second and third.[1]

[1] Bankers' checks are instruments *sui generis*, in many respects resembling bills of exchange, but in some entirely different. "They are not accepted nor indorsed, nor protestable, nor entitled to any days of grace" (3 Burr. 1517); and it was once thought that they were not negotiable generally, but only within the bills of mortality (ib.); and even now, though in fact negotiable, and often negotiated, they are not considered as intended for negotiation, and a person takes them from the holder subject to perils not incident to negotiable instruments generally. Down v Halling, 4 B. & C. 833. It is difficult, however, to see how a solvent drawer, on a solvent banker, can be prejudiced by delay in the presentment of a check. By drawing such a check, he appropriates a sum of money, then in his bankers' hands, to the payment thereof, and cannot honestly reduce his account below that amount (Boehm v. Stirling, 7 T. R. 429); and, as between him and the payee of the check, the question of reasonable time for presentment can scarcely arise, unless some damage has arisen in consequence of the non-presentment. But the refusal to pay by bankers may arise from other causes than their own insolvency. The drawer of the check may have become insolvent, or have withdrawn his account: in which cases, it is difficult to see how he is injured by the delay. Another reason for the bankers

ROBINSON v. HAWKSFORD.

IN THE QUEEN'S BENCH, MAY 29, 1846.

[*Reported in* 9 *Queen's Bench Reports*, 52.]

ASSUMPSIT. The declaration stated that defendant, on, &c., made his draft or order in writing for the payment of money, called a banker's check, and directed the same to the Wolverhampton and Staffordshire Banking Company, and thereby required them to pay plaintiff or bearer £26 19*s*., and then delivered the same to plaintiff; and that the said company did not pay the said check, although the same was then presented to them, of which defendant then had due notice, and, in consideration of the premises, he promised to pay, &c. Count on an account stated.

Pleas. To the 1st count. 1. That defendant did not make his draft, &c., in manner, &c.: conclusion to the country. 2. That the supposed check was not presented to the said company, nor had defendant notice thereof, &c., in manner, &c.: conclusion to the country. 3. That, although the said check was presented to the said company on a certain day and year, to wit, on, &c., yet defendant says that the said check was not then presented for payment to the said company duly nor within a reasonable and proper time in that behalf. Verification. To the second count, *non assumpsit*.

Replication to plea 3. That the said check was presented for payment to the said company duly and within a reasonable and proper time in that behalf: conclusion to the country. Issue thereon. To the other pleas, *similiter*.

On the trial before Cresswell, J., at the Liverpool summer assizes, 1845, a verdict was taken for the plaintiff, subject to the opinion of this court upon a special case, which, after referring to the pleadings, went on as follows:—

The plaintiff and the defendant were and are attorneys residing at

refusing to pay may be the staleness of the check, it being understood as a rule of business with regular bankers not to pay old checks without inquiry. If, upon the bankers refusing on that ground to pay the check, the holder were to commence an action against the drawer, without giving him an opportunity of authorizing his bankers still to pay the check, the plaintiff would probably fail, on the averment of due presentment of the check, as was contended in the principal case; and the non-presentment in due time might, under such circumstances, support the plea of payment of the original debt by the check. Although the holder of a check, who does not present it within a reasonable time, is guilty of laches, the consequences of such laches may vary according to the circumstances of each case.

Wolverhampton in the county of Stafford; and the said Wolverhampton and Staffordshire Banking Company were and are bankers at Wolverhampton aforesaid before and at, and ever since, the date of the said check, which was drawn by the defendant and delivered by him to the plaintiff, at Wolverhampton aforesaid, upon the day of its date. The following is a copy of the check: —

"WOLVERHAMPTON, 13th June, 1845.

"Wolverhampton and Staffordshire Banking Company. Pay George Robinson, Esq., or bearer, twenty-six pounds nineteen shillings on my account. J. HAWKSFORD.

"£26 19*s*. 0*d*."

Before and at, and ever since, the date of the said check, the said banking company were the bankers of the defendant, who kept a banking account with them. The said check was presented by the plaintiff to the said banking company at their bank at Wolverhampton for payment on 28th June, A.D. 1845, and was refused payment by the said banking company in pursuance of directions given them for that purpose by the defendant on the 21st day of June in the same year; and the said check remains unpaid. Upon and ever since the day of the date of the said check, the said banking company have been solvent; and, ever since the said check was given, a much larger sum than £26 19*s*. has been due to the defendant from the said banking company upon the balance of his said banking account with them. The defendant received no damage by the said delay in the presentment of the said check for payment.

At the time the said check was given by the defendant to the plaintiff, there was no debt due from the defendant to the plaintiff on any account; but it was given by the defendant to the plaintiff for the costs of an action of trespass brought by John Bates Toovey against Thomas Honor Simkiss, in which action the plaintiff was the attorney of the said T. H. Simkiss. Upon receiving the said check, the plaintiff gave to the defendant a receipt for the amount in the following words: "Toovey *v.* Simkiss. Received of defendant, by payment of Mr. John Hawksford, the sum of £26 19*s*. the costs in this action. G. Robinson."

It is agreed that the court may draw any such inferences as the jury ought to have drawn if the facts above stated had been proved before them; and that the court are to direct in what manner the several issues are to be entered; or, if the said court shall so think fit, they may direct the verdict to be vacated, and a nonsuit, or verdict for the defendant, entered.

Cowling, for the defendant, was called upon by the court. This

action is not brought on the consideration of the check, but simply on the promise to pay, implied by the instrument itself. A check is understood to be an order for immediate payment. Lord Tenterden treated it as an equivalent to such an order, in Smith v. Ferrand.[1] [LORD DENMAN, C. J. Convenience has established a rule as to presentment; but, when you say that the check was presented at an unreasonable time, it lies on you to show facts which make the time unreasonable.] In Alexander v. Burchfield,[2] a check delivered on the 10th of March was paid in on the 12th; and Tindal, C. J. (after evidence of the practice as to presentment), told the jury that he thought the presentment too late, unless they found that the defendant had dispensed with an earlier presentment; and, a verdict being found for the defendant, the Court of Common Pleas, on motion for a new trial, upheld the ruling. It is true, however, that the bankers, in that case, had stopped payment. [LORD DENMAN, C. J. Yes; and therefore it became necessary to inquire whether the presentment was in reasonable time. PATTESON, J. Does the drawer of a check undertake to pay in any given time? I think the holder is only bound to present, so as to avoid any prejudice that might arise from the drawee becoming insolvent. If the presentment were a year after the date, that alone would not warrant the drawer in telling the banker not to pay.] In Moule v. Brown,[3] presentment at a bank in Bath the next day but two was held too late, though the bankers had not become insolvent. Park, J., cited Boddington v. Schlencker[4] as showing that a check should be presented the day after it is received. A distinction was attempted on the ground that the check there was a London one; but Tindal, C. J., said: "The result of the cases, from Rickford v. Ridge to Boddington v. Schlencker,[4] is that the party receiving a check has till the following day to present it, where there are the ordinary means of doing so. Here the plaintiffs resided in a post town; and, if they had transmitted the check to Bath by the next day's post, it would have been presented on Thursday. If there was any sufficient reason for not pursuing that course, it lies on them to show it." Park, J., said: "The cases are uniform that the presentment of the check should not be delayed beyond the next day;" and Vaughan, J., added: "That rule was laid down in Rickford v. Ridge, where Lord Ellenborough said, 'The rule to be adopted must be a rule of convenience; and it seems to me to be convenient and reasonable that checks received in the course of one day should be presented the next.' If any other rule were adopted, it would be difficult, if not impossible, to draw the line." The question, what is reasonable time,

[1] 7 B. & C. 19
[2] 7 M. & G. 1061.
[3] 4 New Ca. 266.
[4] 4 B. & Ad. 752.

is to be considered with reference to the person who has to present. he must present the next day, unless there are circumstances which excuse him. Here none appear. All the parties lived in the same town. It would be a very inconvenient practice that the holder of a check should have liberty to present it a fortnight or a year after he received it. He ought not to complain if in such a case he loses his remedy on the check, and is obliged to sue on the consideration. [PATTESON, J. Moule v. Brown [1] was not an action against the maker; and no one said that an action would not have lain against him. But, as between subsequent parties, a third person passing the check had a right to expect that the person taking it from him should present in reasonable time. Serle v. Norton is a direct authority against you.] The ruling of the judge is so; but the plea to which it referred was rendered immaterial by the verdict on other pleas. [LORD DENMAN, C. J. The ruling amounts to a clear opinion from Lord Abinger, the very best opinion on such a subject that ever was in Westminster Hall. There is a very sensible note upon the case in Moody v. Robinson.] The cases show a custom in London; and a similar one ought to prevail in the country. It is important to the convenience of the drawer: when he delivers the check, he may have money at his banker's to meet it; but in a week he may want to take the money away. [LORD DENMAN, C. J. Then he would be a very dishonest person. If the rule be, "First come, first served," that might take effect in an hour as well as in a week. PATTESON, J. If the bank continues solvent, I do not see what harm it does the drawer of the check that his money should lie there a year instead of being drawn out by the holder. LORD DENMAN, C. J. No rule is more simple than that, things continuing the same at the bank, the drawer of the check remains liable upon it.]

Unthank, contra, was not heard.

LORD DENMAN, C. J. Where a loss has occurred by the check not being presented, it is necessary to inquire if there was any unreasonable delay; and the loss itself would be some evidence of that fact. In Down v. Halling,[2] where the defendants had taken a check six days old, and received payment at the banker's, the date was considered as a circumstance of suspicion, among the other matters in evidence; but it was not suggested that the drawer's liability had ceased. In the present case, no suspicion is raised. Lord Abinger in Serle v. Norton was not distinguishing between London and country notes. but between cases where, from the circumstances, a particular rule as to reasonableness becomes applicable, and cases where such rule does not apply. Under ordinary circumstances, the only rule is that, if things have

[1] 4 New Ca. 266. [2] 4 B. & C. 330.

continued the same, and no damage has arisen from delay of presentment, the drawer continues liable.

PATTESON, J. It would be very inconvenient that the drawer of a check should be entitled, if it were not paid in two days, to countermand payment at the banker's. It is suggested that the holder might sue on the consideration; but I do not know that he could, if he had vitiated the check by delay in the presentment. Moule v. Brown [1] is distinguishable from this case on the ground already pointed out. As between the drawer of a check and the holder, if presentment is deferred to such a time that inconvenience has been sustained, the time may then be deemed unreasonable; but, if none has resulted, I see nothing unreasonable in a presentment, I should even say, at any time within six years.[2]

WILLIAMS, J. If the question arises, who is to be the loser when the banker becomes unable to pay, the point is properly raised whether the check was presented in due time; but, if things remain the same, the check is still a check, and the money is money applicable to the payment; and I cannot conceive that the rule as to time applies.

Judgment for plaintiff.[3]

[1] 4 New Ca. 266.

[2] In Brust v. Barrett, 16 Hun, 409, the Statute of Limitations was held to be a bar to an action against the drawer of a check which had been issued more than six years before, although it had never been presented for payment, and whether the drawer had funds in the bank upon which the check was drawn was said to be immaterial. — ED.

[3] Alexander v. Burchfield, 7 M. & G. 1067 (*semble*); Laws v. Rand, 3 C. B. N. S. 442; Deener v. Brown, 1 MacArth. 350; Hoyt v. Seeley, 18 Conn. 353; Daniels v. Kyle, 1 Ga. 304; 5 Ga. 245; Howes v. Austin, 35 Ill. 396; Lawrence v. Schmidt, 35 Ill. 440; Willetts v. Paine, 43 Ill. 432; Heartt v. Rhodes, 66 Ill. 351; Stevens v. Park, 73 Ill. 387; Allen v. Kramer, 11 Chic. L. N. 94; 2 Bradwell, 205, s. c.; Henshaw v. Root, 60 Ind. 220; Gregg v. George, 16 Kas. 546; Succession of Kercheval, 14 La. An. 457; Foster v. Paulk, 41 Me. 425; Emery v. Hobson, 63 Me. 32; Pack v. Thomas, 21 Miss. 11; St. John v. Homans, 8 Mo. 382; Morrison v. McCartney, 30 Mo. 188; Little v. Phenix Bank, 2 Hill, 425; 7 Hill, 359; Elting v. Brinkerhoff, 2 Hall, 459 (*semble*); Harbeck v. Craft, 4 Duer, 122; Woodin v. Frazee, 38 N. Y. Sup'r. Ct. 190; Syracuse R. R. v. Collins, 57 N. Y. 641; 3 Lans. 29, s. c.; Stewart v. Smith, 17 Oh. St. 82; Planters' Bank v. Merritt, 7 Heisk. 177; Planters' Bank v. Keesee, 7 Heisk. 200; Schoolfield v. Moon, 9 Heisk. 171; Bell v. Alexander, 21 Grat. 6; Purcell v. Allemong, 22 Grat. 739; Kinyon v. Stanton, 44 Wis. 479, *accord*.

If the drawer has suffered damage to an amount less than the amount of the check, he is discharged only *pro tanto*. See cases cited *supra*.

The rule of the principal case applies when a creditor receives from his debtor the check of a third person on account of the debt. Hopkins v. Ware, L. R. 4 Ex. 268; Marrett v. Brackett, 60 Me. 524.

One who accepts a bill, or makes a note, payable at a bank, may be charged by the same measure of diligence in presentment which is requisite to charge the

KEENE v. BEARD.

IN THE COMMON PLEAS, MAY 1, 1860.

[*Reported in* 8 *Common Bench Reports, New Series*, 372.]

THIS was an action by the bearer against the payee and indorser of a check.

The declaration stated that one Thomas S. Bodenham, on the 10th of March, 1859, made his draft or order in writing for the payment of money, commonly called a check on a banker, and directed the same to certain persons trading as bankers by the name and style of The Union Bank of London, and thereby required them to pay to the defendant or bearer the sum of £11, and then delivered the said draft or order to the defendant, who then indorsed and delivered the same to one George Lewis, who transferred and delivered the same to the plaintiff, who then became and was and still is the lawful bearer thereof; and the said draft or order was duly presented for payment, and was dishonored, of which the defendant had due notice, but did not pay the same.

To this declaration the defendant demurred, the ground of demurrer being "that the defendant, by indorsing the check to Lewis, did not render himself liable to an action upon the check at the suit of a third party or bearer thereof upon the dishonor thereof, and that the declaration discloses no good cause of action." Joinder.

Grant, in support of the demurrer.[1]

G. Denman, contra, was not called upon.

ERLE, C. J. I am of opinion that the plaintiff is entitled to judgment on this demurrer. The action is brought by the holder or bearer of a check against the payee and indorser. The declaration states

drawer of a check. Rhodes *v.* Gent, 5 B. & Al. 244; Dougherty *v.* Western Bank, 13 Ga. 287, 295.

Subject to the exception illustrated by the principal case, checks are governed by the rules of diligence which apply to ordinary bills of exchange payable on demand. But the drawer of a memorandum check (so called from the abbreviation 'mem.' or 'memo.' written upon its face) is understood by custom where such checks are used to become immediately liable for the amount of the check without any demand upon the bank or notice of dishonor. Franklin Bank *v.* Freeman, 16 Pick. 535; Turnbull *v.* Osborne, 12 Abb. Pr. N. S. 200. See also Kelley *v.* Brown, 5 Gray, 108; Skillman *v.* Titus, 32 N. J. 96; Dykers *v.* Leather Bank, 11 Paige, 612. — ED.

[1] The argument of defendant's counsel has been omitted. — ED.

that one Bodenham on a certain day made a draft or order in writing for the payment of money, commonly called a check on a banker, and directed the same to certain persons trading as bankers, and thereby required them to pay to the defendants or bearer the sum of £11, and then delivered the said draft or order to the defendant, who then indorsed and delivered the same to one Lewis, who transferred and delivered the same to the plaintiff, who then became and was and still is the lawful bearer thereof. It then goes on to allege that the said draft or order was duly presented for payment, and was dishonored. The point urged by Mr. *Grant*, on the argument of the demurrer, was that a check is not to be classed with bills of exchange so far as to be capable of creating a liability in an indorser to the person who may be the holder or bearer of the instrument. I think he has failed to establish that proposition. A check is strongly analogous to a bill of exchange in many respects. It is drawn upon a banker; and, though in practice the banker does not accept the draft, he might for aught I know do so. A check has also some of the incidents of a bill of exchange, if not all, as, in respect of its paying by delivery, and also in respect of a *bona fide* holder taking it for value having a better title than the person from whom he received it. Having these incidents of a bill of exchange, has it the further incident of being capable of passing by indorsement? that is, where the indorsement is made, not by merely placing the name of the party on the back of the instrument, but doing so with the intention of passing the title to it, and of incurring all the usual liabilities of an indorser of a negotiable instrument? It is admitted here that the defendant's name was placed upon the check *animo indorsandi;* and therefore our judgment for the plaintiff is in accordance with the real intention of the parties. The indorser intended to give to the indorsee the security of his name and liability on the instrument. I also think our decision is in accordance with the law, when we hold that a check is a negotiable instrument, and capable of indorsement.

Byles, J. I am of the same opinion. I conceive that a check is in the nature of an inland bill of exchange payable to the bearer on demand.[1] It has nearly all the incidents of an ordinary bill of

[1] A check may be payable to order as well as to bearer. Eyre *v.* Waller, 5 H. & N. 463, *per* Bramwell, J.; Charles *v.* Blackwell, 2 C. P. D. 156; *In re* Brown, 2 Story, 502, 512; Harker *v.* Anderson, 21 Wend. 372, 374; Elting *v.* Brinkerhoff, 2 Hall, 459. In Charles *v.* Blackwell, *supra*, Cockburn, C. J., said, p. 156: "The only reason why checks were not so drawn [*i. e.* payable to order] before the passing of 16 & 17 Vict. c. 59, was that they required the same stamp as a bill of exchange of the like amount. With the necessary stamp, such a check would have been perfectly valid." — Ed.

exchange.[1] In one thing, it differs from a bill of exchange: it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person; whereas, it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange. There is another difference between the two instruments: in the case of a bill of exchange, the drawer is discharged by default of a due presentment to the acceptor; but, in the case of a check, the drawer is not discharged by a delay in the presentment, unless it be shown that he has been prejudiced thereby, for instance, by the failure of the banker on whom it is drawn. In all other respects, a check is precisely like an inland bill of exchange. Mr. Grant is in error when he supposes that the negotiability of inland bills of exchange rested entirely on the statute 9 & 10 W. III. c. 17. It reposes on the law-merchant, as it had been understood and applied for at least a hundred years before the passing of that statute. Bills of exchange indorsed in blank, and promissory notes payable to bearer, were well-known instruments. So the bonds and notes of foreign states and princes are all treated in this country as negotiable instruments, and are available in the hands of persons taking them for value. That being so, it seems to me to be clear that a check falls within the class of ordinary bills of exchange; and, if so, why may it not be indorsed, so as to impose upon the indorser the ordinary liabilities which flow from the indorsement of a negotiable instrument? No inconvenience can result from our holding this; for it was distinctly decided in Wayman *v.* Bend[2] that in an action against the maker of a promissory note payable to A B, or bearer, if the declaration states that A B indorsed the note to the plaintiff, the indorsement — that is, an indorsement *animo indorsandi* — must be proved. So, in Story on Promissory Notes, § 132, it is said that, "although a note payable to bearer is transferable by mere delivery, it may also be transferred by indorsement of the payee, or of any other subsequent holder. In such a case, the indorser incurs the same liabilities and obligations as the indorser of a negotiable note payable to order, from many of which, in the case of a mere transfer by delivery, he is exempt." It is true that a man's name may and very often is written on the back of a check or bill without any idea of rendering himself liable as an indorser. Indeed, one of the best receipts is the placing on the back of the instrument the name of the person who has received payment of it. Such an entry of the name on the instru-

[1] A check is a bill of exchange within the "Summary Procedure on Bills of Exchange Act," 18 & 19 Vict. c. 67. Eyre *v.* Waller, 5 H. & N. 460. — Ed.

[2] 1 Camp. 175.

ment is not an indorsement. So a man frequently puts his name on the back of a bank-note. In all these cases, the act of writing may or may not be an indorsement, according to circumstances. All that we mean to decide on the present occasion is that, where a man indorses an instrument of this sort, *animo indorsandi*, and delivers it so indorsed to a third person, he renders himself liable to be sued upon the instrument, as indorsee, by any subsequent holder. I entertain no doubt whatever upon the subject; and I do not think any mischief or inconvenience can result from our so deciding. I may add that I do no injustice to the able argument of Mr. Grant, when I observe that it would have been deserving of more attention if it had been addressed to the court a hundred years ago.

KEATING, J. I also am of opinion, upon all the authorities, that a check is an instrument which is capable of being indorsed, and that the payee, if he indorses it with intent to make himself liable as an indorser, as is alleged in this declaration, is chargeable as such at the suit of any subseqent *bona fide* holder.

Judgment for the plaintiff.[1]

HOPKINSON v. FORSTER.

IN CHANCERY, BEFORE SIR GEORGE JESSEL, M. R., DECEMBER 21, 1874.

[*Reported in Law Reports*, 19 *Equity*, 74.]

THIS was an interpleader suit instituted by Messrs. Hopkinson, bankers and army agents, for the purpose of ascertaining the rights of the claimants to a fund in their hands.

The plaintiffs were the bankers of the defendant, Forster, who, up to the 7th of May, 1867, was a cornet in the Third Dragoon Guards. The plaintiffs were also the agents of that regiment. On the 7th of May, 1867, Forster retired from the army, having sold his commission; and on the following day it became the duty of the plaintiffs, as agents of the regiment, out of moneys placed in their hands as such agents, and held by them subject to the directions of the military authorities, to issue to Forster the sum of £365 18*s.* 6*d.*, the price of the commission. On that date, a balance of £38 4*s.* 8*d.* was standing to Forster's credit on his private banking account.

Various claims having been made to the proceeds of the sale of the commission, this suit was instituted; and the plaintiffs paid into court the sums of £365 18*s.* 6*d.* and £38 4*s.* 8*d.*

[1] Barbour *v.* Bayon, 5 La. An. 804; McDonald *v.* Union Bank (Court of Session), March 29, 1864, *accord.* — ED.

The cause now came on to be heard. Amongst other claims made to the fund in court was one by the defendant, Dr. Cullen, which arose under the following circumstances: —

Dr. Cullen was assistant surgeon in the regiment to which Forster belonged. In February, 1867, the regiment was quartered in India. On the 25th of that month, Forster applied to Cullen to change a check for him; and Cullen accordingly advanced Forster £50, he giving Cullen a check for that amount, dated the same day, and drawn on the plaintiffs. On the 23d of April, 1867, the plaintiffs received a letter from Forster in the following terms: —

"Before leaving India, I drew some checks on you, which I hope have been met before this by my commission money. If they have not, please let me know; also, how soon I may expect my commission. I also wish you to place £25 to Captain Fitzgerald's credit, and £50 to Dr. Cullen's, as soon as possible."

The check was presented on the 23d of May, 1867, and was dishonored.

Mr. Chitty, Q. C., and *Mr. Cracknall*, for the plaintiffs.

Mr. A. T. Watson, for Dr. Cullen.

First, the letter written by Forster created a charge in my favor.

[THE MASTER OF THE ROLLS. You can have no charge in equity without an intent to charge. The letter on which you rely was not written with any intent to charge the fund: it was a mere letter of instructions to the bankers.]

Secondly, the check itself constitutes a good equitable assignment. In Keene *v.* Beard, Mr. Justice Byles says, with respect to a check, this: "In one respect, it differs from a bill of exchange: it is an appropriation of so much money of the drawer's in the hands of the banker upon whom it is drawn for the purpose of discharging a debt or liability of the drawer to a third person; whereas, it is not necessary that there should be money of the drawer's in the hands of the drawee of a bill of exchange." That shows my claim to be good, at all events, to the £38 4*s.* 8*d.*

Mr. Roxburgh, Q. C., *Mr. Graham Hastings*, *Mr. Davey*, *Mr. Kisch*, and *Mr. Everitt* were for other defendants.

[*Ex parte* South [1] and Larivière *v.* Morgan [2] were referred to.]

SIR G. JESSEL, M. R. A check is clearly not an assignment of money in the hands of a banker: it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honor the check, when he has sufficient assets in his hands. If he does not fulfil his contract, he is liable to an action by the drawer, in which

[1] 3 Sw. 392. [2] Law Rep. 7 Ch. 550.

heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Mr. Justice Byles in the case of Keene *v.* Beard; but I am quite sure that learned judge never meant to lay down that a banker who dishonors a check is liable to a suit in equity by the holder.

His Honor decided on the other claims to the £365 18*s.* 6*d.*, but held that the £38 4*s.* 8*d.* had been improperly paid into court, there being no conflicting claims as to it; and he directed the latter sum to be repaid to the plaintiffs.[1]

[1] It is perfectly clear that the holder of an uncertified check has no claim, either at law or in equity, against the bank upon which it is drawn. Wharton *v.* Walker, 4 B. & C. 163; Yates *v.* Bell, 3 B. & Al. 643; Warwick *v.* Rogers, 5 M. & G. 374; Schroeder *v.* Central Bank, 34 L. T. Rep. 735; 24 W. R. 710, s. c.; Bank of Republic *v.* Millard, 10 Wall. 152; First Nat. Bank *v.* Whitman, 94 U. S. 343; Essex Bank *v.* Bank of Montreal, 7 Biss. 193; Griffin *v.* Kemp, 46 Ind. 172 (*semble*); Case *v.* Henderson, 23 La. An. 49 (in effect overruling Van Bibber *v.* La. Bank, 14 La. An. 481); Moses *v.* Franklin Bank, 34 Md. 574; Bullard *v.* Randall, 1 Gray, 605; Nat. Bank *v.* Eliot Bank, 5 Am. L. Reg. 711; Dana *v.* Third Bank, 13 All. 445; Carr *v.* Nat. Security Bank, 107 Mass. 45; Second Bank *v.* Williams, 13 Mich. 282 (*semble*); Dykers *v.* Leather Bank, 11 Paige, 612; Chapman *v.* White, 2 Seld. 412; Butterworth *v.* Paige, 5 Bosw. 341; Schneider *v.* Irving Bank, 1 Daly, 500; Lunt *v.* Bank of N. Am., 49 Barb. 221; Ætna Bank *v.* Fourth Bank, 46 N. Y. 82; Tyler *v.* Gould, 48 N. Y. 682; Duncan *v.* Berlin, 60 N. Y. 151; Att'y.-Gen. *v.* Continental Co., 71 N. Y. 325; Loyd *v.* McCaffrey, 46 Pa. 410; First Bank *v.* Gish, 72 Pa. 18. In Schroeder *v.* Central Bank, *supra*, the holder of a check sought to charge the bank under the Judicature Act (36 & 37 Vict. c. 66, § 25, sub sect. 6), whereby the assignee of a chose in action may enforce his claim in his own name at law. But the attempt was of course unsuccessful. Brett, J., said, 24 W. R. 710: "The bank has made a contract with the drawer that they will honor his checks to the amount of his account. They break that contract. How can that give a right of action to a third person? The check is but an order to pay, and not an absolute assignment of any thing."

See Simmons *v.* Savings Society, 31 Oh. St. 457.

The following cases are *contra:* Munn *v.* Burch, 25 Ill. 35; Chicago Co. *v.* Stanford, 28 Ill. 168; Fourth Bank *v.* City Bank, 68 Ill. 398; Union Bank *v.* Oceana Bank, 80 Ill. 212; Lester *v.* Given, 8 Bush, 357; Weinstock *v.* Bellwood, 12 Bush, 139 (*semble*); Roberts *v.* Austin, 26 Iowa, 315; McGrade *v.* German Institution, 4 Mo. App. 330; Zelle *v.* German Institution, 4 Mo. App. 401; McGregor *v.* Loomis, 1 Disney, 247; Bromley *v.* Commercial Bank, 9 Phila. 522; Fogarties *v.* State Bank, 12 Rich. 518.

But these cases rest on no sound principle, and can possess no value, except in the jurisdictions where they were decided. The very essence of a bill of exchange lies in the fact that the obligations of all parties to it are based upon a general personal credit. To construe a check, therefore, as an order to pay a part or the whole of a specific fund, is to deny its existence as a bill of exchange. — Ed.

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WILLETS v. THE PHŒNIX BANK.

IN THE SUPERIOR COURT, NEW YORK, MARCH, 1853.

[*Reported in* 2 *Duer*, 121.]

THE action was brought to recover the amount of four checks certified by the defendants to be good.[1]

BY THE COURT, OAKLEY, C. J. Whether the teller had any authority from the bank to certify the checks in suit is not a question that we are called upon to consider under the pleadings, since the complaint avers, and the answer in terms admits, that the certifying of the checks was the act of the defendants.

The case, therefore, of Massey *v.* The Eagle Bank [2] is not applicable; nor is it necessary now to say whether we should have followed that decision, had the question as to the authority of the teller been properly raised.[3]

The objection that the checks were not negotiable, and consequently that the plaintiff, being merely an assignee, took them subject to every defence to which they were liable when transferred to him, was much insisted upon in the argument; but we are satisfied that it is untenable.

One of the checks was payable to the order of 1658, the other three to the order of bills payable; and, as the required order could not in either case possibly be given, the checks, unless transferable by delivery, were payable to no one, and were void upon their face. The law is well settled that a draft payable to the order of a fictitious person, inasmuch as a title cannot be given by an indorsement, is, in judgment of law, payable to bearer. Vere *v.* Lewis,[4] Minet *v.* Gibson. And it seems to us quite manifest that in principle these decisions embrace the pres-

[1] The statement of facts has been omitted, all that is necessary to an understanding of the case being contained in the judgment of the court. — ED.

[2] 9 Metc. 309.

[3] By a general principle of the law of agency, a check certified by the officer of a bank, who regularly certifies checks drawn upon it, will bind the bank to a *bona fide* holder, although, as between himself and the bank, the officer may have exceeded his authority. Merch. Bank *v.* State Bank, 10 Wall. 604; Claflin *v.* Farmers' Bank, 25 N. Y. 293 (*semble*); Cooke *v.* State Bank, 52 N. Y. 96; Clark Bank *v.* Bank of Albion, 52 Barb. 592; Dorsey *v.* Abrams, 85 Pa. 299 (*semble*), in which cases the checks were certified by the cashier or president; Farmers' Bank *v.* Butchers' Bank, 14 N. Y. 623; 16 N. Y. 125, s. c.; Meads *v.* Merchants' Bank, 25 N. Y. 143, in which cases the checks were certified by the paying teller. But see Massey *v.* Eagle Bank. 9 Met. 306 (certification by the paying teller), *contra*. In Pope *v.* Bank of Albion, 57 N. Y. 126, the bank was not bound by a check certified by the assistant cashier, it being beyond the scope of so subordinate an officer of the bank to certify checks. — ED.

[4] 3 Term R. 183.

ent case. At any rate, the bank, by certifying the checks as good, is estopped from denying that they were valid as drafts upon the funds of the maker, and consequently were payable to bearer. The giving of such a certificate, if otherwise construed, would be a positive fraud.

The only question, therefore, that remains to be considered is whether the facts that payment of the checks was not demanded until nearly two months after they were certified, and that in the mean time the maker had drawn all his funds from the bank, including those represented by the checks, constitute a valid defence? For, if not, the plaintiffs are clearly entitled to our judgment.

The answer to the question evidently depends upon the construction to be given to the act of the proper officer of a bank in certifying a check. Is it a mere declaration of an existing fact? Or does it create a new and binding obligation on the part of the bank? Is it simply a declaration that the maker had then funds in the bank corresponding with the amount of the check? Or is it an appropriation of those funds to the credit of the check, and a promise that, upon demand, they shall be applied to its payment? If the former, the defendants are not liable. If the latter, they have no defence.

That the latter is the true legal interpretation of a certified check we cannot doubt, since upon any other construction the act of certifying would be nugatory or would operate as a fraud. It would be nugatory, if understood by all, as creating no obligation on the part of the bank to retain funds to meet the payment of the check. It would operate as a fraud, if generally understood as creating an obligation which the law would hold not to exist.

The sole and manifest object of the maker or holder of a check, in requiring it to be certified, is to enable him to use it as money; that is, to pass it to others with the same certainty of its acceptance, as affording the same security to a holder; and the bank, in complying with the request, must know that such is its object.

It is therefore certain that a bank, by certifying a check, means to give it a currency and value that would not otherwise belong to it; and this additional value, it seems to us, can only be given by interpreting the certificate as an unconditional promise of payment, whenever payment shall be demanded: otherwise, a certified check would be of no more use or value than the ordinary check, and would afford no greater security to a holder. The certificate is a useless form, unless it means, not merely that the check was good when certified, but that it will be good when presented for payment. This construction is, therefore, necessary to give effect to the apparent intention of the parties, and at any rate is necessary to prevent the check from being subsequently used as a means of deception and fraud.

We did not understand the counsel for the defendant as denying that a certified check imports an obligation on the part of the bank to retain sufficient funds of the maker to meet its payment; but this obligation, he contended, exists only for a limited period, and may therefore be wholly discharged by the laches of the holder in demanding payment.

When this demand is delayed, even for a few days, the counsel insisted that the holder of the check takes upon himself the risk of a withdrawal of the funds which, had he acted with due diligence, would have been applied to its payment. Such is, indeed, the nature of the defence set up in the answer, in the distinction which it avers to exist between a certified check and a certificate of deposit; but no evidence of the general usage and custom which the answer alleges as establishing this distinction was given upon the trial, and, in the absence of such evidence, there is no ground of principle, it seems to us, upon which it can be maintained. We can perceive no reasons for restricting the obligation of the bank within the limits suggested, or any other, and consequently none for the imputation of laches to a holder.

The obligation of the bank is simple and unconditional to pay upon demand; and in all such cases the demand may be made whenever it suits the convenience of the party entitled to the stipulated payment.

When the business of a bank is properly conducted, it is not possible that it can sustain any loss or prejudice from this interpretation of its contract, — the contract which it makes in certifying a check; and it is only where delay may be prejudicial that the want of due diligence may be legally imputed, and operate as a bar to a claim otherwise valid. When the business of the bank is properly conducted, it is the duty of the officer certifying the check to cause it to be immediately charged, as paid, in the account of the drawer; and, when this is done, the sum thus charged will remain as a deposit in the bank to the credit of the check, and be for ever withdrawn from the control of the maker, except as a holder of the check. Such a deposit stands exactly upon the same ground as every other. The bank, instead of being prejudiced, is benefited by the delay of its owner in calling for its payment, and can with no more propriety impute laches to the unknown holder of the check than to a known holder of an ordinary deposit. The loss which the bank, in this case, by resisting the demand of the plaintiff, seeks to avoid, has resulted from the laches of the teller in suffering Tripler, the maker of the checks, to withdraw the funds that were appropriated to their payment; but assuredly neither the laches of its own officer, nor the fraud of Tripler, can excuse the bank from a compliance with its own engagement. As we intimated upon the argu-

ment, there is in reality, in good sense, no distinction, in the nature of the liability created, between a certified check and a note of the bank payable on demand. Each is intended to circulate as money, — each is an absolute promise to pay a specific sum upon demand, and laches in making the demand is no more imputable in the one case than in the other. The only difference between them is that the promise, which in the note is expressed, in the check is implied.[1] . . .[2]

The plaintiffs are entitled to judgment upon the verdict for the sum of $4,000, which they advanced upon the checks, with interest and costs.

STEPHEN MORSE, JR., AND ANOTHER, v. THE MASSACHUSETTS NATIONAL BANK.

FRANK S. FISKE v. SAME.

IN THE CIRCUIT COURT OF THE UNITED STATES, FIRST CIRCUIT, MARCH, 1873.

[*Reported in* 1 *Holmes*, 209.]

ACTIONS at law by the payees of certain checks drawn by one Beal on the defendant bank. The defendant demurred to the declarations, and the cases were heard on the demurrers. The material allegations of the declarations are stated in the opinion.

George S. Hale, *George S. Hillard*, for plaintiffs.

Preston & Kimball, *Converse & Kelley*, for defendant.

SHEPLEY, J. The declaration in each of these cases alleges that the plaintiff, on the 29th day of August, 1866, was the owner and possessor of a check drawn and signed by one B. Franklin Beal, whereby Beal directed the Massachusetts National Bank to pay to the order of the plaintiff the sum of ten thousand two hundred and ninety dollars; that the plaintiff on the same day presented the check for payment; and the defendants, in consideration that the plaintiff would deposit said check for collection in some other bank in the city of Boston, so that the same should be presented for payment through an association

[1] Merchants' Bank v. State Bank, 10 Wall. 604; Mussey v. Eagle Bank, 9 Met. 305; Farmers' Bank v. Butchers' Bank, 16 N. Y. 125; 14 N. Y. 623, s. c.; Meads v. Merchants' Bank, 25 N. Y. 143; Girard Bank v. Bank of Penn, 39 Pa. 92; Andrews v. German Bank, 9 Heisk. 211; Memphis v. Wetter, 9 Heisk. 224, *accord*.

A note payable at a banker's is certified in the same manner and with the same effect as a check. Meads v. Merchants' Bank, 25 N. Y. 143. — ED.

[2] The learned judge here quoted from the judgment in Mussey v. Eagle Bank, 9 Met. 311, in confirmation of his opinion. — ED.

called and known as the Clearing-house Association, promised and agreed with the plaintiff, that, upon such presentation, they, the said defendants, would pay the same; and the plaintiff alleges that, in consideration thereof and in pursuance of the said request, he did agree to deposit said check in some other bank in Boston, that the same should be transmitted from said bank through the clearing-house for payment, and accordingly did deposit it in the First National Bank; and the check was, by the First National Bank, through the Clearing-house Association, duly presented to defendants for payment, and defendants refused to pay the same. Defendants demur to the declaration, and plaintiffs join in the demurrer.

There is no averment that, at the time of presentation of the check, the drawer had any funds on deposit in the defendant bank, or that defendant at that time was under any obligation to honor his checks.[1]

There being no funds of the drawers of these checks in the bank, the bank received no benefit or advantage from the promise of the holder to deposit the checks in the other bank, and that the same should be presented through the clearing-house. The promisors lost nothing by such promise. They had seasonably presented the checks; were guilty of no laches; were not even obliged to notify the drawers of the non-payment, the drawee having no funds. They did not disable themselves from enforcing their debt against Beal, or promise to delay enforcing or collecting it. They were as much at liberty to collect their debts of Beal, while the unpaid checks were in the banks, or clearing-house, for collection, as if they were in fact, as they were in law, in their own possession.

The debt remained the debt of Beal. The promise of the bank to pay it was a promise to pay the debt of another, and void under the Statute of Frauds. This is not a case where the guaranty or promise which is collateral to the principal contract is made at the same time, and becomes an essential ground of the credit given to the principal or direct debtor. In this case, the collateral undertaking of the bank was subsequent to the creation of the debt, and was not the inducement to it, though the subsisting liability was the ground of the promise. There must, to sustain the promise and take it out of the operation of the statute, be some other and further consideration shown; for the consideration for the original debt will not attach to this subsequent promise. Wain *v.* Warlters,[2] Leonard *v.* Vredenburgh.[3] The promise of the payees of these checks, as set out in the declaration, does not amount to such further and new consideration as to take the case out of the operation

[1] A portion of the opinion relating to the authority of a cashier to bind his bank has been omitted. — ED.

[2] 5 East. 20.

[3] 8 Johns. 81.

of the statute. It is contended that it amounts to a parol acceptance of the checks, and that a parol acceptance of a check is good. Authority may be found in many text-books of writers of high authority upon commercial law, for the proposition stated, without qualification or exception, that a parol acceptance of a bill is good. *Vide* 1 Parsons on Bills and Notes, 285. But it is believed that an examination of the cases cited in support of this proposition will not sustain its application to the case of a parol accommodation acceptance of a bank-check. A verbal acceptance of, or a verbal promise to accept, a check, when the acceptor has funds of the drawer in his hands, is entirely without the operation of the statute, from the consideration that the drawee's engagement is, in fact, to pay his own debt to the drawer, the owner of the funds. But it is not perceived how any sound reason can be given why a verbal acceptance or promise to accept, for the mere accommodation of the drawer, without funds or value received, should not be treated as within the statute. Browne on Statute of Frauds, §§ 172, 174; Quin *v.* Hanford,[1] Pike *v.* Irwin,[2] Pillans *v.* Van Mierop,[3] Johnson *v.* Collings, Curtis *v.* Brown,[4] and cases cited; Dexter *v.* Blanchard.[5] Courts have frequently expressed their dissatisfaction that the rule with regard to implied as well as parol acceptances of bills has been carried as far as it has, and their regret, as stated in Boyce *v.* Edwards,[6] "that any other act than a written acceptance of the bill had ever been deemed an acceptance."

In Townsley *v.* Sumrall,[7] which decides that a verbal accommodation acceptance is taken out of the statute by the circumstance that the party to whom the promise was made paid money on the strength of it, the whole opinion on this point in the case proceeds upon the assumption that, without some new and original consideration moving between the parties to the collateral undertaking, a verbal accommodation acceptance is within the statute. The mischief of the rule holding parol acceptances of bills to be good was so apparent, that the subject has been regulated by statute in several of the States, requiring the acceptance to be in writing; and in England, by the statute 1 & 2 Geo. IV. c. 78, an acceptance of an inland bill must be in writing, and on the bill itself. But the reasons given for holding good a parol accommodation acceptance of a bill of exchange do not apply to the case of a bank-check. The distinguishing characteristics of checks, as contradistinguished from bills of exchange, are that they are always drawn upon a bank or a banker; that they are payable immediately on presentment without the allowance of any days of

[1] 1 Hill, 82. [2] 1 Sand. 14. [3] Burr. 1663. [4] 5 Cush. 884.
[5] 11 Allen, 365. [6] 4 Pet. 122. [7] 2 Pet. 170.

grace; and that they are never presentable for acceptance, but only for payment. Story on Promissory Notes, § 489, and cases cited in note. The promise declared on does not amount to an acceptance. If it be treated either as a promise to accept or a promise to pay, it cannot avail the plaintiffs. No consideration to support the promise is stated or appears. The checks were not taken on the faith of such promise. The holder gave nothing, and relinquished no advantage for the promise. All the cases, including those before cited, which hold that a promise to accept amounts to an acceptance, put the doctrine on the ground that the holder has taken the bill on the faith of the promise. Coolidge *v.* Payson, Schimmepennich *v.* Bayard,[1] Adams *v.* Jones,[2] Russell *v.* Wiggins.[3]

The promise declared on must be considered as one without consideration, and therefore *nudum pactum.* Overman *v.* Hoboken City Bank.[4] *Demurrers sustained.*

SEVENTH NATIONAL BANK *v.* COOK.

IN THE SUPREME COURT, PENNSYLVANIA, APRIL 1, 1878.

[*Reported in* 73 *Pennsylvania Reports*, 488.]

THE opinion[5] of the court was delivered May 17, 1873, by

READ, C. J. James Greenwood was indebted to David Cook for oil sold, and in payment gave a check on the defendants, The Seventh National Bank, for $174.50, to J. C. Barnes, a clerk of the plaintiff, payable to the order of D. Cook. Mr. Barnes indorsed it with the name of D. Cook, and his own name, drew the money, and appropriated it to pay an amount due him by his employer, and made the proper entries on the books of D. Cook. The plaintiff refused to recognize the acts of his clerk, and obtained the cancelled check from Greenwood, presented it to the bank, was refused payment, and then commenced this suit. The court charged the jury that "the only question is whether Barnes had authority to indorse the check for Cook, and upon that I leave the case with you;" and the jury found a verdict for the plaintiff, Cook, for the amount of the check. Upon the argument, the counsel for the bank cited but one case, Bank of Republic *v.* Millard,[6] and contended the holder of the check could not recover against the bank. It was in evidence that the bank had paid the check when presented by Barnes, and that, upon settlement of

[1] 1 Pet. 284. [2] 12 Pet. 207. [3] 2 Story, 237. [4] 1 Vroom, 61, 68.

[5] All that is material to an understanding of the case being contained in this opinion, the rest of the case has been omitted. — ED.

[6] 10 Wal. 172.

Greenwood's bank-book, the check was returned with other checks, cancelled, and of course charged against the depositor. This brings it within the exception stated by the Supreme Court of the United States towards the close of their opinion in 10 Wallace: "It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster (the drawer), would be considered as holding the money thus appropriated for the plaintiff's use, and therefore under an implied promise to him to pay it on demand."

On the merits, therefore, the case was for the plaintiff.

It is, in fact, an acceptance, and binds the bank as a certified check does. "It is tantamount to an acceptance of a draft."

There is nothing in the other assignments of error.

Judgment affirmed.[1]

[1] Van Bibber *v.* La. Bank, 14 La. An. 481; Dodge *v.* Nat. Bank, 80 Oh. St. 1; 20 Oh. St. 234, s. c., *accord.*

First Bank *v.* Whitman, 94 U. S. 343, *contra.*

In the latter case, Hunt, J., delivering the opinion of the court, said, p. 335, 347: "It is not to be doubted, however, that it is within the power of the bank to render itself liable to the holder and payee of the check. This it may do by a formal acceptance written upon the check, in which case it stands to the holder in the position of a drawee and acceptor of a bill of exchange. Merchants' Bank *v.* State Bank, 10 Wall. 604; Espy *v.* Bank of Cincinnati, 18 Wall. 604.

"It may accomplish the same result by writing upon it the word 'good,' or any similar words, which indicate a statement by it that the drawer has funds in a bank applicable to the payment of the check, and that it will so apply them. (*a*) Cooke *v.* State Bank of Boston, 52 N. Y. 96. And such certificate, it is said, discharges the drawer. As to him, it amounts to a payment. First Nat. Bank *v.* Leach. . . .

"It is further contended that such an acceptance of the check as creates a privity between the payee and the bank is established by the payment of the amount of this check in the manner described. This argument is based upon the erroneous assumption that the bank has paid this check. If this were true, it would have discharged all of its duty, and there would be an end of the claim against it. The bank supposed that it had paid the check; but this was an error. The money it paid was upon a pretended and not a real indorsement of the name of the payee. The real indorsement of the payee was as necessary to a valid payment as the real signature of the drawer; and, in law, the check remains unpaid. Its pretended payment did not diminish the funds of the drawer in the bank, or put money in the pocket of the

(*a*) In Espy *v.* Bank of Cincinnati, it was intimated that a verbal statement by the proper officer of a bank, upon which a check was drawn, that "it was good," was not equivalent to writing the word "good" upon the check. In Barnet *v.* Smith, 30 N. H. 256, a similar verbal statement was said to amount to an acceptance of the check, but not to convert the check into a certificate of deposit. — Ed.

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THE FIRST NATIONAL BANK OF JERSEY CITY, APPELLANT, v. JAMES L. LEACH, RESPONDENT.

IN THE COURT OF APPEALS, NEW YORK, APRIL, 1873.

[*Reported in 52 New York Reports*, 350.]

APPEAL from judgment of the general term of the Supreme Court in the first judicial department, affirming a judgment in favor of defendant, entered upon a verdict.

This action was brought upon a check drawn by defendant. The check was drawn upon the Ocean National Bank, was dated November 21st, 1871, for $1,410, payable on the 12th of December, 1871, to the order of James Dolby. It was delivered to the payee, and discounted for him by plaintiff. At eleven o'clock A. M. of the 12th December, plaintiff caused the same to be presented to the drawee for certification, and it was certified as good. The drawer had at that time on deposit sufficient to pay the check, and the amount thereof was charged to him. Within an hour or two thereafter, the Ocean National Bank, the drawee, suspended; and a receiver was appointed, who took possession afterward. Upon the same day, the check was presented for payment; and, payment being refused, the same was duly protested.

Upon this state of facts, the court directed a verdict for defendant, to which plaintiff's counsel duly excepted.

William F. Shepard, for the appellant. A check presented for payment the day after it is dated is presented in season. Merchants' Bank *v.* Spicer,[1] Mohawk Bank *v.* Broderick,[2] Hazelton *v.* Colburn,[3] Johnson *v.* Bank of North America,[4] Himmelmann *v.* Hotaling.[5] Presentment for acceptance or certification and presentment for payment are separate and distinct acts, followed by different consequences.

person entitled to the payment. The state of the account was the same after the pretended payment as it was before.

"We cannot recognize the argument that a payment of the amount of a check or sight draft, under such circumstances, amounts to an acceptance, creating a privity of contract with the real owner. It is difficult to construe a payment as an acceptance under any circumstances. The two things are essentially different. One is a promise to perform an act: the other, an actual performance. A banker or an individual may be ready to make actual payment of a check or draft when presented, while unwilling to make a promise to pay at a future time. Many, on the other hand, are more ready to promise to pay than to meet the promise when required. The difference between the transactions is essential and inherent." — ED.

[1] 6 Wend. 443. [2] 13 Wend. 133. [3] 2 Abb. N. S. 199.
[4] 5 Rob. 554. [5] 6 Am. R. 600.

Merchants' Bank *v.* State Bank,[1] Meads *v.* Merchants' Bank,[2] Farmers', &c., Bank *v.* Butchers', &c., Bank,[3] Claflin *v.* Farmers', &c., Bank,[4] Irving Bank *v.* Wetherald,[5] Willetts *v.* Phœnix Bank, Harker *v.* Anderson,[6] Johnson *v.* Bank of North America.[7]

Louis C. Waehner, for the respondent. The certification of a check by a bank is equivalent to payment. Smith *v.* Miller, Meads *v.* Merchants' Bank,[2] Claflin *v.* Farmers', &c., Bank. Plaintiff, by taking the certification of the Ocean Bank, substituted that bank in the place of defendant as its debtor. Meads *v.* Merchants' Bank.[2] The certification amounted to a certificate of deposit. Smith *v.* Miller, Merchants' Nat. Bank *v.* State Bank.[1] The certification of a check by a bank is the act by which the bank transfers the amount of the check to the holder. Harris *v.* Clark,[8] Bank Republic *v.* Miller.[9] By accepting the certification, the drawer was discharged, and plaintiff must look to the acceptors. Plahto *v.* Reynolds, Mont. Co. Bank *v.* Albany City Bank,[10] Pratt *v.* Foote,[11] Ontario Bank *v.* Lightbody.[12]

PECKHAM, J. The defendant drew the check in controversy: it was discounted by the plaintiff; and, on the day it was due, it was presented by plaintiff to the drawee, the Ocean Bank, for certification, was certified as good, and in the afternoon of the same day was presented for payment, which was refused, because, between the time of its certificate and its second presentment, the drawee, the Ocean Bank, had failed and gone into the hands of a receiver. Did this certification operate as a payment of the check as between these parties?

The theory of the law is that, where a check is certified to be good by a bank, the amount thereof is then charged to the account of the drawer in the bank certificate account. Every well-regulated bank adopts this practice to protect itself.

The reason therefor is so strong that the law presumes it is adopted by the banks. Smith *v.* Miller, Meads *v.* The Merchants' Bank of Albany,[2] The Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank,[4] Merchants' Bank *v.* State Bank.[1] It is found to have been done in this case.

If a bank failed to keep such account and to make such entries, it would necessarily incur the peril of the failure of its customers whose checks it certified, without any account of their number or amount, although it would be liable to pay its certified checks to *bona fide* holders, whether it had funds or not. Farmers' & Mechanics' Bank *v.* Butchers' & Drovers' Bank, *supra*.

It follows that, after a check is certified, the drawer of the check

[1] 10 Wall. 604, 647
[2] 25 N. Y. 143, 147.
[3] 28 N. Y. 425, 428.
[4] 25 N. Y. 293, 297.
[5] 86 N. Y. 335.
[6] 21 Wend. 372.
[7] 5 Rob. 554.
[8] 3 N. Y. 120.
[9] 10 Wall. 152.
[10] 8 Barb. 399, 400.
[11] 9 N. Y. 469.
[12] 18 Wend. 101.

cannot draw out the funds then in the bank necessary to meet the certified check. That money is no longer his.

If he apprehended danger from the suspected failure of the bank, he could not draw out that money, because it had already been appropriated by means of the check thus certified: as to him, it was precisely as if the bank had paid the money upon that check, instead of making a certificate of its being good.

For that reason, the drawer could have no remedy against the bank, by any legal proceeding, to secure himself for the amount of that check. Hence, if the drawer should get the check back, he would strictly be entitled to get that money, not by virtue of his original deposit, but solely by surrender of the certified check, like any other holder.

But all that has been yet stated applies with equal force to the acceptance of a time bill of exchange before due. Then, when the drawee accepts, it is an appropriation of the funds, *pro tanto*, for the service and use of the payee or other person holding the bill, so that the amount ceases henceforth to be the money of the drawer, and becomes that of the payee or other holder in the hands of the acceptor. Story on Bills of Exchange, § 14; 1 Parsons on Notes and Bills, 323.

It is entirely clear that the acceptance of a time draft, before due, does not operate as a payment as respects the drawer. Its only effect is to make the acceptor the primary party to pay the draft.

But the parties to a certified check, due when certified, occupy a different position. There the money is due and payable when the check is certified. The bank virtually says that check is good: we have the money of the drawer here ready to pay it. We will pay it now, if you will receive it. The holder says, No, I will not take the money. You may certify the check, and retain the money for me until this check is presented.

The law will not permit a check, when due, to be thus presented, and the money to be left with the bank for the accommodation of the holder, without discharging the drawer.

The money being due, and the check presented, it is his own fault if the holder declines to receive the pay, and for his own convenience has the money appropriated to that check, subject to its future presentment at any time within the Statute of Limitations.

The acceptance of a time draft before due is entirely different: there the holder has then no right to the money, and the acceptor no authority to pay until the maturity of the bill. There is no necessity for presenting a check for acceptance, like a time bill, no authority for such presentment, although the holder has the right to do it. The authority and the duty are to present for payment.

If, however, the holder choose to have it certified instead of paid, he will do so at the peril of discharging the drawer.

He cannot change the position and increase the risk of the drawer without discharging him. Smith v. Miller.

This would not discharge the drawer of a check, who himself procured it to be certified and then put it in circulation. The reason of the rule fails to apply to him in such case.

I am not aware of any direct authority upon this question; but upon principle it must be held that the bank holds the money, after certification to the holder, not at the risk of the drawer, but of the holder of the check.

The judgment must be affirmed.

All concur. *Judgment affirmed.*[1]

[1] Essex Bank v. Bank of Montreal, 7 Biss. 193; Freund v. Importers' Bank, 76 N. Y. 352, *accord.*

Wood v. Merchants' Bank, 41 Ill. 267; Irving Bank v. Wetherald, 86 N. Y. 335 (in which cases the certification was upon notes payable at a bank), *contra.*

Conf. Bickford v. First Bank, 42 Ill. 238; Rounds v. Smith, 42 Ill. 245; Brown v. Leckie, 48 Ill. 497; Thomson v. Bank of B. N. Am., 45 N. Y. Sup'r Ct. 1.

Crossed Checks. — By custom, the crossing of a check with the name of a banker amounted to a direction by the owner to the drawee to pay it only through a banker, and the disregard of this direction would be evidence of negligence in case the payment should be made to one who was not the lawful holder. But the crossing did not restrict the negotiability of the check. Bellamy v. Marjoribanks, 7 Ex. 389; Carlon v. Ireland, 5 E. & B. 765. By 19 & 20 Vict. c. 25, this custom was made a part of the statutory law. Simmons v. Taylor, 4 C. B. N. s. 463; Smith v. Union Bank, L. R. 10 Q. B. 291; 1 Q. B. D. 31, s. c.

By Stat. 39 & 40 Vict. c. 81, § 12, a banker who has in good faith and without negligence received payment for a customer of a check crossed generally or specially to himself shall not, in case the title to the check proves defective, incur any liability to the true owner of the check by reason only of having received such payment. See Matthiessen v. London Co., 41 L. T. Rep. 35 (C. P. D.).

Forged Indorsement of a Check. — By 16 & 17 Vict. c. 59, § 19 (*supra*, Vol. I. p. 485, n. 1), a banker who paid a check to the ostensible indorsee was protected to the same extent as if the check had been payable to bearer. Hare v. Copeland, 18 Ir. C. L. 426. And if the check had once been delivered to the payee, a payment, good as to the banker, inured to the benefit of the drawer. See also St. 39 & 40 Vict. c. 81, § 9, and Charles v. Blackwell, 2 C. P. D. 151. But this statute did not deprive the owner of a check of his right to claim it even from a purchaser for value without notice, who held under a forged indorsement. Ogden v. Benas, L. R. 9 C. P. 513; Bobbett v. Pinkett, 1 Ex. D. 368.

CHAPTER X.

NEGOTIABLE PAPER OTHER THAN BILLS, NOTES, AND CHECKS.

GORGIER *v.* MIEVILLE AND ANOTHER.

IN THE KING'S BENCH, JUNE 22, 1824.

[*Reported in* 3 *Barnewall & Cresswell*, 45.]

TROVER for a Prussian bond. Plea, not guilty. At the trial before Abbott, C. J., at the London sittings after last Michaelmas term, it appeared that the bond in question had been deposited by the plaintiff in the hands of Messrs. Agassiz & Co., to hold for the benefit of the plaintiff, and receive the interest upon it. Agassiz & Co., being in want of money, pledged the bond to the defendants. By the bond, the King of Prussia declared himself and his successors bound to every person who should for the time being be the holder of the bond, for the payment of the principal and interest, in the manner there pointed out. It was further proved that bonds of this description were sold in the market, and passed from hand to hand daily, like exchequer bills, at a variable price, according to the state of the market. Upon these facts, the Lord Chief Justice was clearly of opinion, that this bond might be pledged to any person who did not know that the person pledging it was not the real owner, and he directed the jury to find a verdict for the defendants, unless they thought that the defendants knew that Messrs. Agassiz & Co. were not the owners of the bond at the time when they deposited it in their hands. The jury having found a verdict for the defendants, a rule *nisi* for a new trial was obtained in last Hilary term, and now

Scarlett, *Marryat*, *Gurney*, and *F. Pollock* showed cause, and contended that a bond of this description being payable to bearer, and the subject of sale like exchequer bills, the property in it passed by delivery, and, therefore, like bank-notes or bills of exchange indorsed in blank, might be pledged by any person holding it in character of agent; and they cited Miller *v.* Race, Grant *v.* Vaughan, Peacock *v.* Rhodes. Collins *v.* Martin, Wookey *v.* Pole.[1]

[1] 4 B. & Al. 1.

The *Attorney-General* and *D. F. Jones*, contra. This case falls rather within Glyn *v.* Baker,[1] in which it was held that the property in an India bond did not pass by delivery. The principal ground upon which bank-notes, bills of exchange indorsed in blank, and exchequer bills have been held to pass by delivery, is, that such instruments constitute a part of the circulating medium of the country, which would be materially impeded if they could be followed. That reason does not apply to a security of a foreign state.

ABBOTT, C. J. I think that this rule must be discharged. This instrument, in its form, is an acknowledgment by the King of Prussia that the sum mentioned in the bond is due to every person who shall for the time being be the holder of it; and the principal and interest is payable in a certain mode, and at certain periods mentioned in the bond. It is, therefore, in its nature, precisely analogous to a bank-note payable to bearer, or to a bill of exchange indorsed in blank. Being an instrument, therefore, of the same description, it must be subject to the same rule of law, that whoever is the holder of it has power to give title to any person honestly acquiring it. It is distinguishable from the case of Glyn *v.* Baker, because there it did not appear that India bonds were negotiable, and no other person could have sued on them but the obligee. Here, on the contrary, the bond is payable to the bearer, and it was proved at the trial that bonds of this description were negotiated like exchequer bills.[2]

Rule discharged.[3]

In re GENERAL ESTATES COMPANY, *Ex parte* CITY BANK.

IN CHANCERY, BEFORE SIR W. PAGE WOOD AND SIR C. J. SELWYN, L.JJ., JUNE 11, 1868.

[*Reported in Law Reports, 3 Chancery Appeals*, 758.]

THIS was a motion by the City Bank, by way of appeal from an order of the Master of the Rolls, admitting them to prove on certain instruments, subject to any equities existing between the original holder and the General Estates Company, Limited.

[1] 15 East, 509.

[2] The negotiability of exchequer bills was established in 1820 by Wookey *v.* Pole, 4 B. & Al. 1. See also Brandao *v.* Barnett, 12 Cl. & F. 787, 805. — ED.

[3] Lang *v.* Smith, 7 Bing. 284 (*semble*); Att'y-Gen. *v.* Bouwens, 4 M. & W. 171; Heseltine *v.* Siggers, 1 Ex. 856 (*semble*); Jones *v.* Peppercorne, John. 430, *accord*. — ED.

The objects of the company, as stated in the memorandum of association, were "to acquire by purchase, lease, or otherwise, freehold, copyhold, leasehold, and other real property, for building thereon, improving, letting, or selling, and the doing of all such other things as are incidental or conducive to the attainment of the above objects."

Nothing was said in the articles[1] as to negotiable instruments, nor as to the mode of executing instruments not under seal, except checks on the company's bankers.

All the instruments to which the appeal related were in the same form as the following:—

"The General Estates Company, Limited.
"Lombard House, George Yard, London, E.C.
"No. 1 A. Debenture. £1000."

In consideration of £1,000 paid to them by J. C. Hodges, Esq., the General Estates Company, Limited, hereby undertake to pay to the order of the said J. C. Hodges, Esq., on 1st July, 1867, the said sum of £1,000, with interest thereon, after the rate of £5 per cent per annum, half yearly, on the 1st day of January and the 1st day of July in each year, on presentation of the annexed interest warrants.

"Given under the common seal of the General Estates Company, Limited, this 5th of December, 1865."

This instrument was under the seal of the company, signed by two directors, and countersigned by the secretary, and was impressed with a common £1 5*s*. stamp not bearing a designation appropriating it to any particular class of instrument. Annexed to the instrument were interest warrants, of which the following is a sample:—

"The General Estates Company, Limited.
"Interest Warrant, No. 1 A.
"£25 payable 1st July, 1867 (subject to income tax) on presentation at the National Bank, Old Broad Street.
"£25. C. W. CARPENTER, *Secretary*."

Hodges had sold land to the company and received payment, partly in cash, partly in bills of exchange, and partly in debentures, which, by their terms, were expressly made charges on the property of the company. Subsequently, in order to facilitate a proposed mortgage by the company, he gave up the debentures and received in exchange the instruments, the form of which is set out above. On the 6th of

[1] Certain provisions of the articles given in the original report have been omitted. —ED.

December, 1865, Hodges sold three of these instruments to Charles Herman, and indorsed them to him, also executing a transfer by deed, which, on the 16th, was carried in by Herman for registration, and he received a certificate that the transfer had been registered. Herman deposited the instruments for value with the City Bank.

The Master of the Rolls held that the case was governed by *In re* Natal Investment Company,[1] and made the order appealed from.

Mr. Swanston, Q. C., and *Mr. J. W. Chitty*, for the appellant.

This case is governed by *In re* Agra and Masterman's Bank,[2] and *In re* Blakely Ordnance Company,[3] and is distinct from the Natal Investment Company. The instruments are, in fact, promissory notes. The stamp not being appropriated to any other instrument will serve for a promissory note. The directors in a company constituted like this can issue negotiable instruments. *In re* Peruvian Railways Company.[4] The instrument does not cease to be a promissory note by being under seal, the promisor being a corporation. Halford *v.* Cameron's Coalbrook, &c. Railway Company.[5]

Mr. Roxburgh, Q. C., and *Mr. Edmund James*, for the official liquidator: —

This is not a promissory note, but a bond, an engagement under seal to pay a sum of money. Nobody would dream of calling it a promissory note but for the words "to the order of," and those words are virtually the same as the words "the holder hereof," in *In re* Natal Investment Company, which case governs the present, and the assignee takes subject to all equities.

Mr. Swanston, in reply.

SIR W. PAGE WOOD, L. J. I incline to think that this instrument is a promissory note; but if not, I think it is an instrument coming within the principles of *In re* Agra and Masterman's Bank,[2] and *In re* Blakely Ordnance Company.[3] The case is stronger in favor of the assignee than in either of those cases, for each of these instruments is more like a promissory note than any thing else. Its being stamped with a deed stamp cannot affect the question, there being nothing to prevent a promissory note being so stamped. It is under seal, but so, in the absence of special powers, must every instrument be which is executed by a corporation. If there had been in these articles any provision, such as we often find, providing for the issuing negotiable instruments not under seal, the argument from the use of a seal would have had much more weight. The instrument is called on the face of it a debenture, which, so far as it goes, is in favor of its being a

[1] Law Rep. 3 Ch. 355.
[2] Law Rep. 2 Ch. 391.
[3] Law Rep. 3 Ch. 154.
[4] Law Rep. 2 Ch. 617.
[5] 16 Q. B. 442.

deed, and not a promissory note; but when we look at its contents we find that the company thereby undertake to pay to the order of Hodges, on the 1st of July, 1867, the sum of £1,000, with interest at the rate of £5 per cent per annum, which, apart from the immaterial substitution of "undertake" for "promise," is the simple and ordinary form of a promissory note. Corporate bodies may issue promissory notes and bills of exchange, where the nature and character of their business warrants it.[1] Here the nature and character of the business is such that the issuing negotiable instruments would be an ordinary and almost necessary incident to it. The better opinion seems to me to be that this is a promissory note, but if it be not so, the authorities go to this, that where there is a distinct promise held out by a company, informing all the world that they will pay to the order of the person named, it is not competent for that company afterwards to set up equities of their own and say that because the person who makes the order is indebted to them they will not pay.

As regards the Natal Company's Case,[2] I do not think that the Lord Chancellor there overruled the other cases. In that case there was an agreement to pay to a certain individual, "his executors, administrators, or transferees," which his Lordship held equivalent to "his executors, administrators, or assigns." Thus far, therefore, the instrument was in the form of an ordinary money bond, but there were the added words "or to the holder for the time being, of this debenture bond," and the Lord Chancellor said those words were not intended to control the general character of the instrument, but were only intended to dispense with the necessity of executing a formal assignment by deed. There the instrument was in other respects in the ordinary form of a covenant to pay, while here it is in the form of a promissory note payable to order.

SIR C. J. SELWYN, L. J. I also think that in this case the company clearly had power to issue negotiable instruments, especially having regard to the 86th clause of the articles. It then remains to be seen whether, according to its true construction, this is a negotiable instrument. The case seems to be stronger than that of Agra and Masterman's Bank,[3] because there, there was a letter of credit which was capable of being put an end to at any time; but in the present case these instruments were finally issued by way of a cash payment. From the nature of the transaction it is to be inferred that it was intended to give negotiable instruments, for they were given in substi-

[1] *In re* Peruvian Co., L. R. 2 Ch. 617; Crouch *v.* Crédit Foncier, L.R. 8 Q.B. 382, *accord.* — ED.

[2] Law Rep. 8 Ch. 855.

[3] Law Rep. 2 Ch. 391.

tution for mortgages, and their being negotiable appears to be the only consideration for the exchange. Then as to their being under the seal of the company, in the absence of any special power, an instrument under seal is the only instrument by which a corporate body can contract at all. The present case is broadly distinguishable from that of the Natal Company, on the grounds mentioned by the Lord Justice. I think, therefore, that these must be treated as negotiable instruments, and that the order of the Master of the Rolls must be varied by striking out the words making the proof subject to equities.[1]

GOODWIN *v.* ROBARTS AND OTHERS.

IN THE EXCHEQUER CHAMBER, JULY 7, 1875.

[*Reported in Law Reports*, 10 *Exchequer*, 337.]

ERROR by the defendants on a judgment of the Court of Exchequer in favor of the plaintiff.

The facts are fully stated in the report of the case in the court below (L. R. 10 Ex. 76).

May 15; June 23, 24. *Benjamin, Q. C.* (*Anstie* with him), for the defendants.

J. Brown, Q. C. (*C. H. Robarts* with him), for the plaintiffs.[2]

July 7. The judgment of the Court (COCKBURN, C.J., MELLOR, LUSH, BRETT, and LINDLEY, JJ.) was delivered by

COCKBURN, C.J. The question for our decision in this case is, whether certain scrip issued by the authority of the Russian government, and certain other scrip issued by the authority of the Austro-Hungarian government, is a negotiable security for money, so that the transfer of it by a person not being the true owner to a *bona fide* holder for value, can confer a good title on the latter.

The scrip in question was bought by the plaintiff through one Clayton, a stockbroker, and was allowed to remain in Clayton's hands, who unlawfully pledged it with the defendants, who are bankers, as secur-

[1] *In re* Blakely Co., L. R. 3 Ch. 154; *In re* Imperial Co., L. R. 11 Eq. 478; *In re* Hercules Co., L. R. 19 Eq. 302 (*semble*), *accord*.

In re Natal Co., L. R. 3 Ch. 355, *contra*.

See Higgs *v.* North Assam Co., L. R. 4 Ex. 387; *In re* North Assam Co., L. R. 10 Eq. 458. — ED.

[2] The arguments of counsel, containing little more than a citation of authorities mentioned in the judgment of the court, have been omitted. — ED.

ity for a loan of money. Clayton having become bankrupt and having absconded, the defendants sold the scrip at the market price of the day, and the plaintiff brings his action to recover the amount realized on such sale.

The scrip in question was in the following form: —

"1873 . C. 1873. Imperial Government of Russia. Issue of £15,000,000 sterling nominal capital in 5 per cent consolidated bonds of 1873. Negotiated by Messrs N. M. Rothschild & Sons, London, and Messrs. de Rothschild Brothers, Paris. Bearing interest half yearly, payable in London from 1st of December, 1873. Scrip for one hundred pounds stock, No. ——.

"Received the sum of twenty pounds, being the first instalment of 20 per cent. upon one hundred pounds stock, and on payment of the remaining instalments at the period specified, the bearer will be entitled to receive a definitive bond or bonds for one hundred pounds after receipt thereof from the Imperial government.

"London, 1st December, 1873. The instalments are to be paid at our office as follows: £15 per cent, or £15 on the 5th February, 1874; £15 per cent, or £15 on the 9th of March, 1874; £20 per cent, or £20 on the 2nd May, 1874; £23 per cent or £23 on the 9th June, 1874. Subscribers may pay the same, under a discount at 3 per cent per annum, on any Monday or Thursday after the 16th inst.

"In default of payment of these instalments at the proper dates, all previous payments will be liable to forfeiture." Then follow four other receipts for £20 each, making up the £100 for which the bond is afterwards to be given.

The scrip issued by the authority of the Austro-Hungarian government was in a precisely similar form.

The scrip in question was issued by Messrs. de Rothschild as the agents of the Russian and Austro-Hungarian governments, they being employed by these governments to negotiate and raise a loan for them respectively on government bonds, bearing interest, to be afterwards issued in exchange for the scrip when all the instalments of the sum for which the scrip was issued should have been paid up. No question is raised as to the fact of Messrs. de Rothschild having acted in the matter as agents of the two governments, or of the scrip having been issued by the authority of the latter.

The bonds issued on the last instalment being paid up were, as will be seen on reference to the special case in which they are set out, in conformity with the terms stated in the scrip. It is only necessary to point out that the bond, agreeably to the terms of the scrip, is made payable to bearer.

The 9th paragraph of the special case contains the following statement, upon which, as it appears to us, the decision of the case turns: —

"The scrip of loans to foreign governments, entitling the bearer thereof to bonds for the same amount when issued by the government, has been well known to and largely dealt in by bankers, money dealers, and the members of the English and Foreign Stock Exchanges, and through them by the public, for over fifty years. It is and has been the usage of such bankers, money dealers, and stock exchanges, during all that time, to buy and sell such scrip and to advance loans of money upon the security of it before the bonds were issued, and to pass the scrip upon such dealing by mere delivery as a negotiable instrument transferable by delivery, and this usage has always been recognized by the foreign governments or their agents delivering the bonds, when issued, to the bearers of the scrip. This usage extended alike to scrip issued by their agents in England, and it extended to the scrip now in question, which was largely dealt in as above-mentioned. Such scrip often passes through the hands of several buyers and dealers in succession before the issue of the bonds represented by it."

The contention on the part of the plaintiff was that, scrip of this description not coming under the category of any of the securities for money, which by the law merchant, are capable of being transferred by indorsement or delivery — indeed, not being a security for money at all, but only for the future delivery of a bond — the right of the true owner could not be divested by the fraudulent transfer of the chattel by a person who had no title as against the owner.

On the part of the defendants it was contended that the finding as to general usage brought the case within the decisions in Gorgier v. Mieville and Attorney-General v. Bouwens.[1] . . .[2]

In Attorney-General v. Bouwens,[1] the question as to the negotiable character of foreign bonds arose in a different form, the question being whether Russian, Danish, and Dutch bonds, of which a testator, dying in this country, was holder at the time of his death, were liable to probate duty. In a special verdict taken at the trial it was expressly found "that the said Russian, Danish, and Dutch bonds respectively were and are, and always have been, marketable securities within this kingdom, and always have been so and transferred within this kingdom by delivery only, and the bearers thereof have always been dealt with as being legally entitled to the principal moneys secured

[1] 4 M. & W. 171.

[2] The learned judge here stated the case of Gorgier v. Mieville, *supra*, p. 748. — Ed.

by the said bonds respectively, and to the interest or dividends from time to time arising or accruing in respect of the same. It never has been nor is it necessary to do or perform any act whatsoever out of the kingdom of England, in order to render a transfer of any of the said bonds valid, and the bearers of the said bonds respectively have always been treated and dealt with by the agents of the empire of Russia, and of the kingdoms of Holland and Denmark, as the persons duly entitled to the principal moneys secured by the said bonds respectively, and the interest or dividends thereof, and such agents have always paid all moneys due and payable for and in respect of the said bonds respectively, according to the tenor and effect thereof, to the bearers of the same."

In like manner, in Heseltine *v.* Siggers,[1] Spanish bonds were treated as passing by mere delivery.

Strenuous efforts were made by Mr. Benjamin in his able argument on behalf of the plaintiff to distinguish the present case from Gorgier *v.* Mieville. He insisted, first, that although it must be admitted that, if a bond had been given in lieu of this scrip, the bond would have been a negotiable instrument, as the case would then have come within Gorgier *v.* Mieville, here there was no engagement on the part of the foreign government. The only party signing the scrip, or who could be held bound by it, were the Messrs. de Rothschild; and the persons advancing their money, and taking the scrip, could look only to them. Secondly, that even assuming that the issuing of the scrip was to be taken to be the act of the foreign government, yet that as it had been issued in London, and the parties taking it had advanced their money in this country, the contract must be taken to have been made here, and must be subject to the law of England. That when a foreign sovereign negotiated a loan in this country, through his agent, it was in effect the same thing as though such sovereign had himself come to this country and entered into the contract in person. That, consequently, in either view, the contract arising on the scrip must be taken to have been made here, and must be dealt with according to English law. That this being so, the case of Crouch *v.* The Crédit Foncier of England[2] was an authority which established that it was not competent to any one by the law of England to give to a security, not negotiable by the law merchant, the character of negotiability, by making it payable to bearer, even though such security were a security for money. That, a fortiori, this scrip, not being a promise to pay money, but only to give a bond when all the instalments should have been paid up, could not have the character of negotiability given to it by being

[1] 1 Ex. 856; 18 L. J. (Ex.) 166. [2] Law Rep. 8 Q. B. 374.

made payable to bearer. That choses in action not being assignable by the general common law, it was only by the law merchant which was recognized by the common law and adopted by it, that a particular class of securities for money could be made negotiable, either by indorsement, or by being made payable to bearer; and that this class of securities was confined to bills of exchange, promissory notes, and drafts payable to bearer. That this scrip did not coincide with either of the securities for money to which by the law merchant, the quality of being so rendered negotiable had been conceded; the more so as in fact it was not a security for money at all, but only an agreement to give such a security in the shape of a bond. That the bonds of foreign governments had been held to be negotiable by the courts of this country, not because they were negotiable by the law of the country in which they were made, but because they were in substance and effect promissory notes.

We entirely dissent from the contention that the contract in question is one in which the Messrs. de Rothschild can be looked upon as principals. And though our decision on that head may not be essential to the conclusion we have arrived at on the case, we think it desirable in a matter in which the public are so much interested that our view should be made known. It is plain on the face of the document that the Messrs. de Rothschild only profess to be acting as the agents of the foreign governments. The law on this subject is correctly laid down in Story on Agency, in the chapter on the Liabilities of Public Agents, § 302. Collecting the English and American authorities in a note, the learned jurist writes as follows: "In the ordinary course of things, an agent, contracting on behalf of the government, or of the public, is not personally bound by such a contract, even though he would be by the terms of the contract, if it were an agency of a private nature. The reason of the distinction is, that it is not to be presumed, either that the public agent means to bind himself personally in acting as a functionary of the government, or, that the party dealing with him in his public character, means to rely on his individual responsibility. On the contrary, the natural presumption in such cases is that the contract was made upon the credit and responsibility of the government itself, as possessing an entire ability to fulfil all its just contracts far beyond that of any private man, and that it is ready to fulfil them not only with good faith, but with punctilious promptitude, and in a spirit of liberal courtesy. Great public inconvenience would result from a different doctrine, considering the various public functionaries which the government must employ in order to transact its ordinary business and operations; and many persons would be deterred from accepting of many offices of trust under

the government, if they were held personally liable upon all their official contracts. This principle not only applies to simple contracts, both parol and written, but also to instruments under seal, which are executed by agents of the government in their own name, and purport to be made by them on behalf of the government; for the like presumption prevails in such cases, that the parties contract not personally, but merely officially, within the sphere of their appropriate duties."

Chancellor Kent lays down the law to the like effect (2nd Commentaries, p. 810, 7th ed.), "There is a distinction in the books between public and private agents on the point of personal responsibility. If an agent, on behalf of government, makes a contract and describes himself as such, he is not personally bound, even though the terms of the contract be such as might, in a case of a private nature, involve him in a personal obligation. The reason of the distinction is, that it is not to be presumed that a public agent meant to bind himself individually for the government, and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express engagement, and the distinction terminates in a question of evidence. The inquiry in all the cases is, to whom was the credit, in the contemplation of the parties, intended to be given. This is the general inference to be drawn from all the cases, and it is expressly declared in some of them."

It is true these authors are speaking of persons acting as agents for their own governments; but the reasoning applies equally to persons acting as agents for a foreign government, and the same presumption must arise in both cases. Nor can we suppose that the persons taking this scrip did so otherwise than through their faith in the honor of the foreign government, just as they would have had to trust to it on their afterwards receiving the bonds in lieu of the scrip. They would then be equally without legal redress against the foreign government and must have trusted to its honor in the fulfilment of its engagements.

We think it unnecessary to enter upon the question whether the contract thus entered into is to be considered as a Russian or an English contract, as we agree in thinking that its negotiable character, if it exists at all, must depend not on what might be its negotiability by the foreign law, but on how far the universal usage of the monetary world has given it that character here. "The question," says Tindal, C.J., in Lang v. Smyth,[1] "is not so much what is the usage in the

[1] 7 Bing. 284, at p. 293.

country whence the instrument comes, as in the country where it passed." The substance of Mr. Benjamin's argument is, that, because the scrip does not correspond with any of the forms of the securities for money which have been hitherto held to be negotiable by the law merchant, and does not contain a direct promise to pay money, but only a promise to give security for money, it is not a security to which, by the law merchant, the character of negotiability can attach.

Having given the fullest consideration to this argument, we are of opinion that it cannot prevail. It is founded on the view that the law merchant thus referred to is fixed and stereotyped, and incapable of being expanded and enlarged so as to meet the wants and requirements of trade in the varying circumstances of commerce. It is true that the law merchant is sometimes spoken of as a fixed body of law, forming part of the common law, and as it were coeval with it. But as a matter of legal history, this view is altogether incorrect. The law merchant thus spoken of with reference to bills of exchange and other negotiable securities, though forming part of the general body of the lex mercatoria, is of comparatively recent origin. It is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interests of trade and the public convenience, the court proceeding herein on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process, what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it. "When a general usage has been judicially ascertained and established," says Lord Campbell, in Brandao v. Barnett,[1] "it becomes a part of the law merchant, which courts of justice are bound to know and recognize."

Bills of exchange are known to be of comparatively modern origin, having been first brought into use, so far as is at present known, by the Florentines in the twelfth, and by the Venetians about the thirteenth century. The use of them gradually found its way into France, and, still later and but slowly, into England. We find it stated in a law tract, by Mr. McLeod, entitled "Specimen of a Digest of the Law of Bills of Exchange," printed, we believe, as a report to the government, but

[1] 12 Cl. & F. at p. 805.

which, from its research and ability, deserves to be produced in a form calculated to insure a wider circulation, that Richard Malynes, a London merchant, who published a work called the Lex Mercatoria, in 1622, and who gives a full account of these bills as used by the merchants of Amsterdam, Hamburg, and other places, expressly states that such bills were not used in England. There is reason to think, however, that this is a mistake. Mr. Macleod shows that promissory notes, payable to bearer, or to a man and his assigns, were known in the time of Edward IV. Indeed, as early as the statute of 3 Rich. 2, c. 3, bills of exchange are referred to as a means of conveying money out of the realm, though not as a process in use among English mer chants. But the fact that a London merchant writing expressly on the law merchant was unaware of the use of bills of exchange in this country, shows that that use at the time he wrote must have been limited. According to Professor Story, who herein is, no doubt, perfectly right, "the introduction and use of bills of exchange in England," as indeed it was everywhere else, "seems to have been founded on the mere practice of merchants, and gradually to have acquired the force of a custom." With the development of English commerce the use of these most convenient instruments of commercial traffic would of course increase, yet, according to Mr. Chitty, the earliest case on the subject to be found in the English books is that of Martin v. Boure,[1] in the first James I. Up to this time the practice of making these bills negotiable by indorsement had been unknown, and the earlier bills are found to be made payable to a man and his assigns, though in some instances to bearer. But about this period, that is to say, at the close of the sixteenth or the commencement of the seventeenth century, the practice of making bills payable to order, and transferring them by indorsement, took its rise. Hartmann, in a very learned work on Bills of Exchange, recently published in Germany, states that the first known mention of the indorsement of these instruments occurs in the Neapolitan Pragmatica of 1607. Savary, cited by Mons. Nouguier, in his work "Des lettres de change," had assigned to it a later date, namely 1620. From its obvious convenience this practice speedily came into general use, and, as part of the general custom of merchants, received the sanction of our courts. At first the use of bills of exchange seems to have been confined to foreign bills between English and foreign merchants. It was afterwards extended to domestic bills between traders, and finally to bills of all persons, whether traders or not: see Chitty on Bills, 8th ed., p. 18.

In the mean time, promissory notes had also come into use, differing

[1] Cro. Jac. 6.

herein from bills of exchange that they were not drawn upon a third party, but contained a simple promise to pay by the maker, resting, therefore, upon the security of the maker alone. They were at first made payable to bearer, but when the practice of making bills of exchange payable to order, and making them transferable by indorsement, had once become established, the practice of making promissory notes payable to order, and of transferring them by indorsement, as had been done with bills of exchange, speedily prevailed. And for some time the courts of law acted upon the usage with reference to promissory notes, as well as with reference to bills of exchange.

In 1680, in the case of Shelden v. Hentley,[1] an action was brought on a note under seal by which the defendant promised to pay to bearer £100, and it was objected that the note was void because not made payable to a specific person. But it was said by the court, "Traditio facit chartam loqui, and by the delivery he (the maker) expounds the person before meant; as when a merchant promises to pay to the bearer of the note, anyone that brings the note shall be paid." Jones, J., said, that "it was the custom of merchants that made that good." In Bromwich v. Lloyd,[2] the plaintiff declared upon the custom of merchants in London, on a note for money payable on demand, and recovered; and Treby, C.J., said that "bills of exchange were originally between foreigners and merchants trading with the English; afterwards, when such bills came to be more frequent, then they were allowed between merchants trading in England, and afterwards between any traders whatsoever, and now between any persons, whether trading or not; and, therefore, the plaintiff need not allege any custom, for now those bills were of that general use that upon an indebitatus assumpsit they may be given in evidence upon the trial." To which Powell, J., added, "On indebitatus assumpsit for money received to the use of the plaintiff, the bill may be left to the jury to determine whether it was given for value received."

In Williams v. Williams, where the plaintiff brought his action as indorsee against the payee and indorser of a promissory note, declaring on the custom of merchants, it was objected, on error, that the note having been made in London, the custom, if any, should have been laid as the custom of London. It was answered "that this custom of merchants was part of the common law, and the court would take notice of it ex officio; and, therefore, it was needless to set forth the custom specially in the declaration, but it was sufficient to say that such a person, secundum usum et consuetudinum mercatorum, drew the bill." And the plaintiff had judgment.

[1] 2 Show. 160. [2] 2 Lutw. 1582.

Thus far the practice of merchants, traders, and others, of treating promissory notes, whether payable to order or bearer, on the same footing as bills of exchange, had received the sanction of the courts, but Holt having become Chief Justice, a somewhat unseemly conflict arose between him and the merchants as to the negotiability of promissory notes, whether payable to order or to bearer, the Chief Justice taking what must now be admitted to have been a narrow-minded view of the matter, setting his face strongly against the negotiability of these instruments, contrary, as we are told by authority, to the opinion of Westminster Hall, and, in a series of successive cases, persisting in holding them not to be negotiable by indorsement or delivery. The inconvenience to trade arising therefrom led to the passing of the statute of 3 & 4 Anne, c. 9, whereby promissory notes were made capable of being assigned by indorsement, or made payable to bearer, and such assignment was thus rendered valid beyond dispute or difficulty.

It is obvious from the preamble of the statute, which merely recites that "it had been held that such notes were not within the custom of merchants," that these decisions were not acceptable to the profession or the country. Nor can there be much doubt that by the usage prevalent amongst merchants, these notes had been treated as securities negotiable by the customary method of assignment as much as bills of exchange properly so called. The Statute of Anne may indeed, practically speaking, be looked upon as a declaratory statute, confirming the decisions prior to the time of Lord Holt.

We now arrive at an epoch when a new form of security for money, namely, goldsmiths' or bankers' notes, came into general use. Holding them to be part of the currency of the country, as cash, Lord Mansfield and the Court of King's Bench had no difficulty in holding, in Miller *v.* Race, that the property in such a note passes, like that in cash, by delivery, and that a party taking it *bona fide*, and for value, is consequently entitled to hold it against a former owner from whom it has been stolen.

In like manner it was held in Collins *v.* Martin, that where bills indorsed in blank had been deposited with a banker, to be received when due, and the latter had pledged them with another banker as security for a loan, the owner could not bring trover to recover them from the holder.

Both these decisions of course proceeded on the ground that the property in the bank-note payable to bearer passed by delivery, that in the bill of exchange by indorsement in blank, provided the acquisition had been made *bona fide*.

A similar question arose in Wookey v. Pole,[1] in respect of an exchequer bill, notoriously a security of modern growth. These securities being made in favor of blank or order, contained this clause, "If the blank is not filled up the bill will be paid to bearer." Such an exchequer bill, having been placed, without the blank being filled up, in the hands of the plaintiffs' agent, had been deposited by him with the defendants on a *bona fide* advance of money. It was held by three judges of the Queen's Bench, Bayley, J., dissentiente, that an exchequer bill was a negotiable security, and judgment was therefore given for the defendants. The judgment of Holroyd, J., goes fully into the subject, pointing out the distinction between money and instruments which are the representatives of money, and other forms of property. "The courts," he says, "have considered these instruments, either promises or orders for the payment of money, or instruments entitling the holder to a sum of money, as being appendages to money, and following the nature of their principal." After referring to the authorities, he proceeds: "These authorities show, that not only money itself may pass, and the right to it may arise, by currency alone, but further, that these mercantile instruments, which entitle the bearer of them to money, may also pass, and the right to them may arise, in like manner, by currency or delivery. These decisions proceed upon the nature of the property (*i.e.* money), to which such instruments give the right, and which is in itself current, and the effect of the instruments, which either give to their holders, merely as such, a right to receive the money, or specify them as the persons entitled to receive it."

Another very remarkable instance of the efficacy of usage is to be found in much more recent times. It is notorious that, with the exception of the Bank of England, the system of banking has recently undergone an entire change. Instead of the banker issuing his own notes in return for the money of the customer deposited with him, he gives credit in account to the depositor, and leaves it to the latter to draw upon him, to bearer or order, by what is now called a check. Upon this state of things the general course of dealing between bankers and their customers has attached incidents previously unknown, and these by the decisions of the courts have become fixed law. Thus, while an ordinary drawee, although in possession of funds of the drawer, is not bound to accept, unless by his own agreement or consent, the banker, if he has funds, is bound to pay on presentation of a check on demand. Even admission of funds is not sufficient to bind an ordinary drawee, while it is sufficient with a banker; and money deposited with a banker is not only money lent, but the banker is

[1] 4 B. & Ald. 1.

bound to repay it when called for by the draft of the customer (see Pott v. Clegg [1]). Besides this, a custom has grown up among bankers themselves of marking checks as good for the purposes of clearance, by which they become bound to one another.

Though not immediately to the present purpose, bills of lading may also be referred to as an instance of how general mercantile usage may give effect to a writing which without it would not have had that effect at common law. It is from mercantile usage, as proved in evidence, and ratified by judicial decision in the great case of Lickbarrow v. Mason,[2] that the efficacy of bills of lading to pass the property in goods is derived.

It thus appears that all these instruments which are said to have derived their negotiability from the law merchant had their origin, and that at no very remote period, in mercantile usage, and were adopted into the law by our courts as being in conformity with the usages of trade; of which, if it were needed, a further confirmation might be found in the fact that, according to the old form of declaring on bills of exchange, the declaration always was founded on the custom of merchants.

Usage, adopted by the courts, having been thus the origin of the whole of the so-called law merchant as to negotiable securities, what is there to prevent our acting upon the principle acted upon by our predecessors, and followed in the precedents they have left to us? Why is it to be said that a new usage which has sprung up under altered circumstances, is to be less admissible than the usages of past times? Why is the door to be now shut to the admission and adoption of usage in a matter altogether of cognate character, as though the law had been finally stereotyped and settled by some positive and peremptory enactment? It is true that this scrip purports, on the face of it, to be a security not for money, but for the delivery of a bond; nevertheless we think that substantially and in effect it is a security for money, which, till the bond shall be delivered, stands in the place of that document, which, when delivered, will be beyond doubt the representative of the sum it is intended to secure. Suppose the possible case that the borrowing government, after receiving one or two instalments, were to determine to proceed no further with its loan, and to pay back to the lenders the amount they had already advanced; the scrip with its receipts would be the security to the holders for the amount. The usage of the money market has solved the question whether scrip should be considered security for, and the representative of, money, by treating it as such.

[1] 16 M. & W. 321. [2] 2 T. R. 63.

The universality of a usage voluntarily adopted between buyers and sellers is conclusive proof of its being in accordance with public convenience; and there can be no doubt that by holding this species of security to be incapable of being transferred by delivery, and as requiring some more cumbrous method of assignment, we should materially hamper the transactions of the money market with respect to it, and cause great public inconvenience. No doubt there is an evil arising from the facility of transfer by delivery, namely, that it occasionally gives rise to the theft or misappropriation of the security, to the loss of the true owner. But this is an evil common to the whole body of negotiable securities. It is one which may be in a great degree prevented by prudence and care. It is one which is counterbalanced by the general convenience arising from facility of transfer, or the usage would never have become general to make scrip available to bearer, and to treat it as transferable by delivery. It is obvious that no injustice is done to one who has been fraudulently dispossessed of scrip through his own misplaced confidence, in holding that the property in it has passed to a *bona fide* holder for value, seeing that he himself must have known that it purported on the face of it to be available to bearer, and must be presumed to have been aware of the usage prevalent with respect to it in the market in which he purchased it.

Lastly, it is to be observed that the tendency of the courts, except only in the time of Lord Holt, has been to give effect to mercantile usage in respect to securities for money, and that where legal difficulties have arisen, the legislature has been prompt to give the necessary remedy, as in the case of promissory notes and of the East India bonds.

The authorities relied on on the part of the plaintiff do not appear to us materially to conflict with this view. In Glyn *v.* Baker,[1] which was an action to recover India Bonds, and in which it was held that such bonds did not pass by delivery, the bonds were not made payable to bearer, and there was a total absence of proof that they passed by delivery, though it was asserted by counsel in argument that when these bonds, which in the first instance were made payable to the treasurer of the company, had been indorsed by him, they were afterwards negotiable and passed by delivery from one to another. The inconvenience which would have arisen from this decision was remedied by the immediate passing of 51 Geo. 3, c. 64, by which bonds of the East India Company were made transferable by delivery.

The case of Partridge *v.* Governor and Company of the Bank of England [2] and which, amongst other things, turned on the negotiability

[1] 13 East, 509.

[2] 9 Q. B. 396; 15 L. J. Q. B. 395.

of dividend warrants of the Bank of England, is not, so far as that question is concerned, altogether satisfactory, as the decision turned also upon other points. The bank were in the habit of paying dividends to those entitled to them by warrants, and it was pleaded and proved that by a usage of sixty years' standing of the bankers and merchants of London, these warrants, which are not made to bearer, were nevertheless negotiable so soon as the party to whom they were made payable had annexed to them the receipt which the bank required before payment would be made. Such a warrant had been obtained by an agent of the plaintiff authorized to receive his dividends, and had been made over to the defendants for good consideration, in fraud of the plaintiff, so far as the agent was concerned, but without knowledge of such fraud on the part of the defendants. The warrant had been delivered by the defendants to the bank, with whom they had an account, to be carried to their credit, and the amount had been entered to their credit in the cash book of the defendants, but had not been carried to their drawing account. The court of Queen's Bench held this proof of the custom to be a good defence. The Court of Exchequer Chamber reversed their judgment, on the ground, among others, that the custom relied on was "rather *a practice of trade* than *a custom* properly so-called, and that such a practice could not alter the law according to which such an instrument conferred no right of action on an assignee." We quite feel the force of this distinction, though it is not quite so clear in what sense it was here intended to be applied. Possibly what was meant was, that the custom applied to the warrants of a particular company, and therefore could not form the subject of any general mercantile usage.

In Dixon *v.* Bovill,[1] where the note was "to deliver so much iron when required to the party lodging this document with me," there was neither a promise to bearer, nor was there any proof whatever of any usage whereby such notes were dealt with as negotiable. The case has therefore, with reference to its facts, no bearing on the present.

In Crouch *v.* The Crédit Foncier of England,[2] the defendants, a limited company, had issued bonds payable to bearer, "subject to the conditions indorsed on this debenture;" and by the conditions so indorsed the bonds were to be paid off by a certain number being drawn at stated periods; in which respect, it may be observed, they bore a close resemblance to the bonds of foreign governments when loans are thus raised by way of bond. A bond thus made having been stolen from the lawful owner, and having been purchased *bona*

[1] 3 Macq. [2] Law Rep. 8 Q. B. 374.

fide by the plaintiff from the thief, was drawn for payment. The plaintiff claimed payment, which was refused, whereupon the action was brought. It was there held by three judges of the Court of Queen's Bench that the plaintiff could not recover; first, because, even assuming that a promise to pay under seal could be considered a promissory note, here the conditions annexed to the promise took away that character from the instrument. No evidence had been offered at the trial as to whether these or similar documents were in practice treated as negotiable, nor was any express admission made as to the point; but it was assumed, from the report of the learned judge before whom the cause was tried, that this had been tacitly admitted. But it was said that these instruments having been only of recent introduction, it followed that such custom, to whatever extent it had gone, must also have been quite recent. Under these circumstances the court held that, while it was incompetent to the defendants, as an individual company, to give to that which was not a negotiable instrument at law the character of negotiability by making it payable to bearer, the custom could not have that effect, because, being recent, it formed no part of the ancient law merchant. For the reasons we have already given we cannot concur in thinking the latter ground conclusive. While we quite agree that the greater or less time during which a custom has existed may be material in determining how far it has generally prevailed, we cannot think that, if a usage is once shown to be universal, it is the less entitled to prevail, because it may not have formed part of the law merchant as previously recognized and adopted by the courts. It is obvious that such reasoning would have been fatal to the negotiability of foreign bonds, which are of comparatively modern origin, and yet, according to Gorgier *v.* Mieville, are to be treated as negotiable. We think the judgment in Crouch *v.* The Credit Foncier[1] may well be supported on the ground that in that case there was substantially no proof whatever of general usage. We cannot concur in thinking that if proof of general usage had been established, it would have been a sufficient ground for refusing to give effect to it that it did not form part of what is called "the ancient law merchant."

In addition to the cases we have already referred to, in which usage has been relied on as making mercantile instruments negotiable, the case of Lang *v.* Smyth[2] was cited as showing that the question with reference to instruments of this description turns upon how far the particular instrument has by usage acquired the quality of negotiability. The action had reference to Neapolitan bonds with coupons

[1] Law Rep. 8 Q. B. 374. [2] 7 Bing. 284.

attached to them, which latter referred to a certificate. The plaintiff's agent being in possession of the coupons belonging to the plaintiff, but not of the certificate, fraudulently pledged the coupons with the defendant, who took them *bona fide*. On an action by the plaintiff to recover the amount received by the defendant on the coupons, Tindal, C.J., left it to the jury to say whether the coupons without the certificate "passed from hand to hand like money or bank notes," in other words, "whether they had acquired, from the course of dealing pursued in the city, the character of bank-notes, bills of exchange, dividend warrants, exchequer bills, or other instruments which formed part of the currency of this country." The jury, indeed, found in the negative, but it was held by the Court of Common Pleas that the question had been rightly left to them. If the usage had been found the other way, and the court had been satisfied with the verdict, it would no doubt have been upheld.

We must by no means be understood as saying that mercantile usage, however extensive, should be allowed to prevail if contrary to positive law, including in the latter such usages as, having been made the subject of legal decision, and having been sanctioned and adopted by the courts, have become, by such adoption, part of the common law. To give effect to a usage which involves a defiance or disregard of the law would be obviously contrary to a fundamental principle. And we quite agree that this would apply quite as strongly to an attempt to set up a new usage against one which has become settled and adopted by the common law as to one in conflict with the more ancient rules of the common law itself. Thus, it having been decided in the two cases of More *v.* Manning, and Acheson *v.* Fountain,[1] that when a bill of exchange was indorsed to A B, without the words "or order," the bill was nevertheless assignable by A B, by further indorsement, Lord Mansfield and the Court of King's Bench, in the case of Edie *v.* The East India Company, held that evidence of a contrary usage was inadmissible. In like manner in Grant *v.* Vaughan, where a cash note, payable to bearer, had been lost by the owner, but had been taken by the plaintiff *bona fide* for value, on an action on the note by the latter against the maker, Lord Mansfield having left it to the jury to say "whether such drafts as this, when actually paid away in the course of trade dealing and business, were negotiable or in fact and practice negotiable," and the jury, influenced no doubt by the natural desire to protect the owner of the note, having found for the defendant, Lord Mansfield and the court here again set the verdict aside, on the ground that, the law having been settled by former decisions that notes payable to bearer passed by delivery

[1] 1 Str. 557.

to a *bona fide* holder, the judge ought to have directed a verdict for the plaintiff.

If we could see our way to the conclusion that, in holding the scrip in question to pass by delivery, and to be available to bearer, we were giving effect to a usage incompatible either with the common law or with the law merchant as incorporated into and embodied in it, our decision would be a very different one from that which we are about to pronounce. But so far from this being the case, we are, on the contrary, in our opinion, only acting on an established principle of that law in giving legal effect to a usage, now become universal, to treat this form of security, being on the face of it expressly made transferable to bearer, as the representative of money, and as such, being made to bearer, as assignable by delivery. This being the conclusion at which we have arrived, the judgment of the Court of Exchequer will be affirmed. *Judgment affirmed.*[1]

[1] Affirmed in the House of Lords, 1 App. Cas. 476. Rumball v. Metropolitan Bank, 2 Q. B. D. 194, *accord.*

In Evans v. Smith, 65 Law Times (a county court decision), a post-office order was held to be a negotiable instrument.

Conf. Glyn v. Baker, 13 East, 509 (India Bonds. But see Stat. 51 Geo. III. c. 64); Jones v. Carter, 8 Q. B. 134 (Lottery tickets); Partridge v. Bank of England, 9 Q. B. 396 (Dividend warrants); Dixon v. Bovill, 3 Macq. 1 (Iron scrip notes); Crouch v. Crédit Foncier, L. R. 8 Q. B. 374 (Debentures) in which cases the instruments were held to be not negotiable. — Ed.

CLARK v. THE FARMERS' WOOLLEN MANUFACTURING COMPANY OF BENTON.

IN THE SUPREME COURT OF JUDICATURE, NEW YORK, MAY, 1836.

[*Reported in* 15 *Wendell*, 256.]

THE action in this case was brought on an instrument in writing in these words: "For value received, the Farmers' Woollen Manufacturing Company of Benton, Ontario county, now in the county of Yates, promise to pay Silas Hunt, or order, $300 (in three equal annual instalments of $100 each; the first to be paid in one year from the date hereof), with interest. In witness whereof, we, the trustees of said company, have hereunto subscribed our names, and affixed the common seal of said company, the first day of June, 1830." Signed, "Abel Peck," "Joseph Ketchum," "Lyman Tubbs;" and to the left hand of the signatures the seal of the company was affixed. The plaintiff declared in debt, as the indorsee of the instrument.[1] The defendant pleaded *nil debet*. The cause was tried before referees. The defendants objected that the plaintiff was not entitled to sustain the action, inasmuch as the instrument declared on was not a negotiable note, within the statute, and that therefore an action would not lie in his name. The referees overruled the objection, and after receiving proof of a set-off to a small amount, made a report in favor of the plaintiff for $334.81, which was now moved to be set aside.

S. Stevens, for the defendants.

I. L. Wendell, for the plaintiff.

BY THE COURT, NELSON, J. The principal question made on the argument was whether the note is negotiable. If it is not, the plaintiff must fail. The seal of the corporation, when affixed to any deed or contract, by proper authority, is not distinguishable in its legal effect from that of an individual. The one is the seal of an artificial, the other of a natural person. It affords the highest evidence of the deliberate assent of the party to the deed or contract thus executed, and, with some important exceptions, is binding, without the aid of the signature, even in the case of an individual. 1 Bl. Com. 476; 2 id. 305, 306; Co. Inst. 234, n. *v*; Com. Dig. tit. B. 1; 17 Ves. 459. A signature is never necessary in the case of a corporate body, as we

[1] Only so much of the case is given as relates to the negotiability of the instrument. — ED.

have already seen. Promissory notes which were made negotiable, the same as inland bills of exchange, by the statute of Anne, were not under seal; Chitty on Bills, 324; if they had been, since that statute, all specialties could have been made negotiable, and the advantage in their favor, in respect to the statute of limitations, would have introduced them into general use. A Prussian bond in England is negotiable, but that rests upon usage, and the nature of the security. By the instrument in that case, the king of Prussia acknowledged that the sum mentioned in it was due to any person, for the time being the holders; and the court likened it to a bank note. Bonds given by the East India Company were held not negotiable, but have been since made so by statute. Glyn *v.* Baker.[1] It is true that, in the case of the Prussian bond referred to, Abbott, C. J., distinguished it from the India bond, in Glyn *v.* Baker, saying it did not appear that those bonds were made negotiable. But if simply adding the words "order," or "bearer," could have had such effect, an act of parliament would have been unnecessary.

It appears to have been conceded by both counsel and court, in the case of Warren *v.* Lynch,[2] that if the flourish (L. S.) at the end of the signature to a note made in Virginia, and payable in New York, must have been considered equivalent to the impression of a seal here, the instrument would not have been negotiable for that reason. The position, we suppose, is too plain to require further consideration.

Report set aside.[3]

[1] 18 East, 509; Chitty on Bills, 109; 51 Geo. 3, c. 64.

[2] 5 Johns. R. 239.

[3] Howell *v.* Hallett, Minor, 102 (*semble*); Sayre *v.* Lucas, 2 Stew. 259; Conine *v.* Junction R. R., 3 Houst. 288; Lewis *v.* Wilson, 5 Blackf. 370; Brown *v.* Lockhart, 9 Mo. 409; Force *v.* Craig, 2 Halst. 272; Warren *v.* Lynch, 5 Johns. 239 (*semble*); Merritt *v.* Cole, 9 Hun, 98; Lynam *v.* Califer, 64 N. C. 572 (*semble*); Biery *v.* Haines, 5 Whart. 563; Hopkins *v.* R. R. Co., 3 Watts & S. 410; Sidle *v.* Anderson, 45 Pa. 464; Parker *v.* Kennedy, 1 Bay, 398; Parks *v.* Duke, 2 McC. 380; Foster *v.* Floyd, 4 McC. 159; Tucker *v.* English, 2 Speers, 673; Skidmore *v.* Little, 4 Tex. 301; Mann *v.* Sutton, 4 Rand. 253, *accord.*

See Sheldon *v.* Hentley, 2 Show. 160; Irwin *v.* Brown, 2 Cranch, C. C. 314; Blackwell *v.* Hamilton, 47 Ala. 470; Broughton *v.* Badgett, 1 Ga. 75; Porter *v.* McCollum, 15 Ga. 528; Spencer *v.* Buchanan, Wright (O.), 583; Bank of St. Clairsville *v.* Smith, 5 Ohio, 222; Avery *v.* Latimer, 14 Ohio, 542; Bain *v.* Wilson, 10 Ohio St. 19 — Ed.

SELDEN F. WHITE, PLAINTIFF IN ERROR, v. THE VERMONT AND MASSACHUSETTS RAILROAD COMPANY.

IN THE SUPREME COURT, UNITED STATES, DECEMBER TERM, 1858.

[*Reported in* 21 *Howard*, 575.]

THIS case was brought up by writ of error from the Circuit Court of the United States for the district of Massachusetts.

The facts are stated in the opinion of the court.

It was submitted on printed arguments by *Mr. Parker* for the plaintiff in error, and *Mr. Hutchins* for the defendant.

Mr. Justice NELSON delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the district of Massachusetts.

The suit was brought in the court below by the plaintiff (White) against the company, upon several bonds issued by the same.

The case was presented to the court upon an agreed statement of facts, and, among others, that the bonds in question were issued by the company, in regular course, and for a sufficient consideration; and that payment had been demanded and refused. Coupons for the accruing interest, previous to the maturity of the bonds, had been duly paid.

It was further agreed that bonds of this description, issued by the company, were sold in the market, and passed from hand to hand by delivery, at prices varying according to the state of the market; and that those in question were issued at or about their date, to a person a citizen of Massachusetts, and were payable in blank, no payee being inserted; that they came into the hands of the plaintiff through several intervening holders, in regular course; and that he then and since lived in the State of New Hampshire, and, before this suit was brought, filled up the blank by inserting "Selden F. White, or order," the name of plaintiff, without the knowledge or consent of the defendants.

The court ruled that the suit could not be sustained, for want of jurisdiction.

The ground upon which this ruling below is sought to be maintained is, that these bonds were issued to citizens of Massachusetts; and as they could not be regarded as negotiable instruments, or, if negotiable, not payable to bearer, the plaintiff was disabled from suing in the

Federal court, within the prohibition of the eleventh section of the judiciary act. 15 Pet. R. 125; 2 ib. 318; 3 How. 574; 8 ib. 441.

In answer to this ground, we think it quite clear, on looking into the agreed state of facts, in connection with the bonds and the mortgage given to secure their payment, that it was the intention of the company, by issuing the bonds in blank, to make them negotiable, and payable to the holder, as bearer, and that the holder might fill up the blank with his own name, or make them payable to himself or bearer, or to order. In other words, the company intended, by the blank, to leave the holder his option as to the form or character of negotiability, without restriction. If the utmost latitude, in this respect, was not intended, why leave the payee in blank when issuing the bonds, or why not fix the limit of negotiability, or negative it altogether? To adopt any other conclusion would seem to us to be unjust to the company, for then the blank would be wholly unmeaning; or if any, a meaning calculated, if not intended, to embarrass the title of the holder.

Assuming, then, that these bonds were intended to be made negotiable, we do not see the difficulty suggested in maintaining the suit in the Federal court; for, until the plaintiff chose to fill up the blank, he is to be regarded as holding the bonds as bearer, and held them in this character till made payable to himself or order. At that time he was a citizen of New Hampshire, and, therefore, competent to bring the suit in the court below.

As to the negotiability of this class of securities, when shown to be intended that they should possess this character by the form in which issued, and mode of giving them circulation, we think the usage and practice of the companies themselves, and of the capitalists and business men of the country, dealing in them, as well as the repealed decisions or recognition of the principle by courts and judges of the highest respectability, have settled the question. Morris Canal Co. *v.* Fisher,[1] Delafield *v.* State of Illinois,[2] Mich. Bank *v.* N. Y. & N. H. R. R. Co.,[3] Carr *v.* Le Fevre,[4] Craig *v.* The City of Vicksburg,[5] Chester W. Chapin *v.* The Vt. & Mass. R. R. Co.[6]

Indeed, without conceding to them the quality of negotiability, much of the value of these securities in the market, and as a means of furnishing the funds for the accomplishment of many of the greatest and most useful enterprises of the day, would be impaired. Within the last few years, large masses of them have gone into general circulation, and in which capitalists have invested their money; and

[1] 1 Stockt. 667, 699.
[2] 2 Hill, N. Y. 177; 8 Paige, Ch. R. 527, s. c.
[3] 3 Kern. R. 625.
[4] 27 Penn. R. 418.
[5] 31 Miss. R. 216.
[6] 8 Gray, 575.

it is not too much to say, that a great share of the confidence they have acquired, as a desirable security for investment, is attributable to this negotiable quality, as well on account of the facility of passing from hand to hand, as the protection afforded to the *bona fide* holder.

It is true that in England the law is, that a bond delivered in blank, as it respects the payee, is void, and the blank incapable of being filled up by the holder, either upon an implied or express parol authority from the maker. This is maintained upon the principle that the authority of an agent to make a deed for another must be by deed; and also, that to admit the parol authority to fill up the blank would, in effect, make a bond transferable and negotiable, like a bill of exchange or exchequer bill. Hibble White *v.* McMorine,[1] and Enthoven *v.* Hoyle et al.[2]

The law had been otherwise held by Lord Mansfield, in the case of Texira *v.* Evans, cited in Master *v.* Miller,[3] but was distinctly overruled by Parke, B., in delivering the opinion of the court in the case first above cited, and the opinion reaffirmed by him still more strongly in the second case.

Courts of the highest authority in this country have followed Lord Mansfield, and have not hesitated to meet the fears expressed by Parke, B. (that the effect would be to make bonds negotiable), by admitting the consequence. Chief-Justice Marshall, in the case of the United States *v.* Nelson & Myers,[4] hesitated to reach this conclusion, but expressed a strong belief that, at some future day, it would be by this court.

We think, for the reasons above given, the ruling of the court below cannot be upheld, and that the judgment should be reversed, with a *venire de novo*, &c.[5]

[1] 6 M. & W. 200.
[2] 18 C. B. 378.
[3] 1 Anst. 228.
[4] 2 Brock. R. 64.

[5] It is well settled in this country, in accordance with the principal case, that the bonds of corporations issued as marketable securities, and so regarded by the mercantile community, possess all the qualities of negotiable paper.

E. g. Bonds Payable to Bearer. — Moran *v.* Miami Co., 2 Black, 722; Mercer Co. *v.* Hackett, 1 Wall. 88; Gelpcke *v.* City of Dubuque, 1 Wall. 175; Murray *v.* Lardner, 2 Wall. 110; Vermilye *v.* Adams, 21 Wall. 138; Cromwell *v.* County of Sac, 96 U. S. 51; State *v.* Wells, 15 Cal. 336; Society for Savings, 29 Conn. 174; Jones *v.* Nellis, 41 Ill. 482; City of Aurora *v.* West, 22 Ind. 88; Calanan *v.* Brown, 31 Iowa, 333; Griffith *v.* Burden, 35 Iowa, 138, 143; Consol. Association *v.* Avegno, 28 La. An. 552; Commonwealth *v.* Chesapeake Co., 32 Md. 501; Chesapeake Co. *v.* Blair, 45 Md. 102, 110; Culver *v.* Benedict, 13 Gray, 7; Commonwealth *v.* Emigrant Bank, 98 Mass. 12; Craig *v.* Vicksburg, 31 Miss. 216; Barrett *v.* County Court, 44 Mo. 197; Ringling *v.* Kohn, 4 Mo. App. 59; Morris Co. *v.* Fisher, 1 Stockt. 667, Morris Co. *v.* Lewis, 1 Beasl. 328; Elizabeth *v.* Force, 29 N. J. Eq. 587; Delafield *v.* State, 2 Hill, 159, 177; 8 Paige, 527, s. c.; Bank of Rome *v.* Village, 19 N. Y. 20.

EVERT EVERTSON, RESPONDENT, v. THE NATIONAL BANK OF NEWPORT, APPELLANT.

IN THE COURT OF APPEALS, NEW YORK, APRIL 6, 18, 1876.

[*Reported in* 66 *New York Reports*, 14.]

APPEAL from judgment of the General Term of the Supreme Court in the third judicial department affirming a judgment in favor of plaintiff, entered upon the report of a referee. (Reported below 4 Hun, 692.)

This action was originally brought against the Indianapolis, Bloomington, and Western Railway Company, to collect ten coupons each for the semi-annual interest due April 1, 1871, on a $1,000 bond issued by said corporation, also to collect forty-seven "interest-warrants," so called, for semi-annual interest due at the same time upon bonds which said corporation was obligated to pay. The present defendant, having made claim to the interest so due and to the instruments, was, by an order of interpleader, substituted as defendant, the corporation paying into court the amount due.

The form of the coupons was as follows: —

Wicks v. Adirondack Co., 2 Hun, 112; Seybel v. Nat. Bank, 54 N. Y. 288; Lindsley v. Diefendorf, 48 How. Pr. 357; Weith v. City, 68 N. C. 24; Carr v. Lefevre, 27 Pa. 413; Carpenter v. Rommel, 5 Phil. (Pa.) 84; McMasters v. Reed, 1 Grant, 86; Rice v. Iron Co., 9 Phila. 294; (but see as to Municipal Bonds, Commonwealth v. Commissioners, 82 Pa. 218, 231; Diamond v. Lawrence, 37 Pa. 353; Armstrong v. Brinton, 47 Pa. 367, *contra*); Langston v. S. Ca. R. R., 2 S. Ca. N. S. 248; Board v. Texas R. R., 46 Tex. 316; Ide v. Passumpsic R. R., 32 Vt. 297; Clarke v. Janesville, 10 Wis. 136.

BONDS PAYABLE TO ——. Chapin v. Vermont R. R., 8 Gray, 575; Tucker v. N. H. Bank, 58 N. H. 83; Boyd v. Kennedy, 38 N. J. 146; Hubbard v. N. Y. R. R. 36 Barb. 286; Dutchess Co. v. Hachfield, 1 Hun, 675; Dinsmore v. Duncan, 57 N. Y. 573; Preston v. Hull, 28 Gratt. 613 (*semble*)

BONDS PAYABLE TO A OR ORDER. — Junction R. R. v. Cleneay, 18 Ind. 161; Bank v. Charlotte R. R., 5 S. Ca. N. S. 156.

BONDS PAYABLE TO A OR ASSIGNS. — Clapp v. Cedar Co., 5 Iowa, 15; Brainerd v. New York R. R., 25 N. Y. 496; Blake v. Supervisors, 61 Barb. 149.

But a bond containing no words of negotiability is not negotiable. Atchison v. Butcher, 8 Kas. 104.

The quality of negotiability was held to attach to the coupon bonds of an individual, as well as to those of a corporation, in In the Matter of Leland, 6 Benedict, 175. — ED.

"$35 THE INDIANAPOLIS, BLOOMINGTON AND WESTERN RAILWAY COMPANY $35

will pay the bearer, at its agency in the city of New York, thirty-five dollars, in gold coin, on the 1st day of April, 1871, for semi-annual interest on bond No. —.

"A. P. LEWIS,
"*Secretary.*"

The form of the warrants was as follows: —

"$35 INTEREST WARRANT FOR THIRTY-FIVE DOLLARS $35

upon bond No. — of the Danville, Urbana, Bloomington and Pekin Railroad Company. Payable in gold coin at the office of the Farmers' Loan and Trust Company in the city of New York, April, 1, 1871.

"W. J. ERMENTROUT,
"*Secretary.*"

In each coupon and warrant the blank for No. — was filled with the number of the bond to which it was attached. The bonds, with the coupons and warrants attached, were owned by defendant. The coupons and warrants were detached and sent to New York by express March 31, 1871, for presentation and payment, and on that day they were stolen from the express office, and were purchased by plaintiff at Albany, April 3, 1871.

The referee found that plaintiff was entitled to judgment for the whole amount claimed, and judgment was perfected accordingly.

Samuel Hand for the appellant.

Nathaniel C. Moak, for the respondent.[1]

ALLEN, J. But two questions are presented upon this appeal: First, whether the instruments which are the subjects of the controversy are negotiable promises for the payment of money, and therefore subject to the same rules as bank bills or other negotiable instruments, so that one who acquires title in the usual course of business and in good faith, although from one who has obtained them feloniously, may withhold them from the true owner; and secondly, whether they were dishonored at time of the purchase of them by the plaintiff.

The rule of *caveat emptor* does not apply to negotiable instruments payable in money and to the bearer; and a purchaser in good faith from one who has stolen them acquires a valid title. Spooner v. Holmes,[2] Birdsall v. Russell.[3]

The coupons of the Indianapolis, Bloomington and Western Railway

[1] The arguments of counsel containing little more than a citation of authorities have been omitted. — ED.

[2] 102 Mass. 503. [3] 29 N. Y. 220.

Company are, in terms, distinct promises to pay the bearer the amount specified therein at a day and place named, and are, within the authorities, promissory notes for the payment of money to the holder, and transferable by delivery, although detached from the bonds to which they refer. The fact that they are declared to be for interest upon bonds specified by their numbers does not destroy their negotiability when separated from the bond, or impair the title of one purchasing from another without production of the bond. The bonds themselves, although under the seal of the company, are negotiable instruments within the repeated decisions of our courts. White *v.* V. and M. Railroad Co., Gelpcke *v.* Dubuque,[1] Clark *v.* Iowa City,[2] Brainerd *v.* New York and Harlem Railroad Co.,[3] Dinsmore *v.* Duncan,[4] Haven *v.* Grand Junc. Railroad and Depot Co.[5] The cases of Myers *v.* York and Cumberland Railroad Company,[6] and Jackson *v.* The Same,[7] holding somewhat different doctrines, cannot be regarded as authority.

The coupons of the Danville, Urbana, Bloomington and Pekin Railroad Company, termed upon their face "interest warrants," are in somewhat different form. Whether they are within that description of property to which a title may be acquired by a *bona fide* transferee for value, notwithstanding a defect of title in the transferrer, depends upon their negotiability. If they are not negotiable instruments, and, as such, representatives of money, the plaintiff acquired no better title than the party from whom he purchased them had; *i.e.*, he took them subject to all the defects of his title and subject to the claims of the true owner. The instruments are not, upon their face, negotiable; they are not payable to any person by name, or his order, or to the bearer, or to the order of a fictitious person. In all the cases to which reference has already been made, the coupons contained distinct promises to pay the bearer the sums named therein at a time and place specified. They were perfect negotiable instruments, independent of the bond from which they had been severed, and were not only negotiable within the statutes upon that subject and the Law Merchant, but were intended by the parties to be negotiable. The negotiability of instruments depends somewhat upon statute. The statute of this State (1 R. S. 768), embodies, substantially, the law, and declares, as understood at the time, what instruments shall be negotiable. To bring an instrument within this statute there must be a promise to pay to the order of the maker, or some other person or his order, or to the order of a fictitious person, or to the bearer, a sum certain absolutely. Whether

[1] 1 Wall. 175. [2] 20 Id. 583. [3] 25 N. Y. 496.
[4] 57 Id. 573. [5] 109 Mass. 88. [6] 43 Me. 232.
[7] 43 Id. 147.

the parties to an instrument can give it a negotiable character with all the incidents pertaining to negotiable paper, when it is not in terms within the class of instruments known to the law as negotiable, may be questioned. Crouch v. Crédit Foncier of England.[1]

It is for the interest of corporations issuing bonds for the payment of money that they should be negotiable; and they are, ordinarily, made so upon their face; and such bonds, as well as the coupons attached thereto, have been held negotiable when payable to bearer; for the reason that they are promises to pay money in the form which, by the law merchant, would make them negotiable as representatives of money, the same as ordinary commercial instruments. In re Imperial Land Company of Marseilles.[2] While it may be for the interest of the company issuing bonds, with a view to their ready negotiation, that they should be negotiable by delivery, there may not be the same reasons for making the coupons for the instalments of interest negotiable when detached from the bonds. The object of the interest warrants before us may be fully accomplished by regarding them as authority to the financial agent of the company to pay the amount named therein upon presentation, although detached from the bonds. It is possible that, as between such agent and the debtor corporation, the possession and presentment of the interest warrants at maturity would be evidence of an authority to receive the money by the person presenting it, even as against the true owner. But if this be conceded, it does not make them negotiable as between third persons. In this, as in other contracts, its negotiability depends upon its terms; and the rule is, with certain exceptions not applicable to this case, that in instruments for the payment of money, if no one be designed as payee, either by name or as bearer, the instrument is not a promissory note. If these warrants are not promissory notes they are not negotiable; they are neither checks nor bills of exchange. 1 Parsons on Bills, 33, and note; Brown v. Gilman,[3] Gibson v. Minet, Douglass v. Wilkeson,[4] Walrad v. Petrie.[5] In the latter case Judge Marcy was inclined to sustain the action upon the instrument as a promissory note, but was reluctant to establish a different rule here from that which seemed to prevail in England, regarding it as important that the statutes, which were alike in both countries as to negotiable paper, should receive the same construction and be applied in the same manner. In a case like the present it would be unwise, in deference to any supposed intent of the parties or public convenience, to depart from the ordinary rules of construction, and give a different effect to different contracts, the

[1] L. R. 8 Q. B. 374. [2] L. R. 11 Eq. Cases, 478. [3] 13 Marv. 158.
[4] 6 Wend. 687. [5] 4 id. 575.

same in form and substance. Checks payable to "the order of bills payable," or to something impersonal in its character, are regarded as payable to the order of a fictitious person, and therefore within the statute payable to the bearer; and bills and notes payable to the order of one not named, but capable of being ascertained, have been also held negotiable within the statute. Willets v. The Phœnix Bank, Stevens v. Strang,[1] United States v. White.[2] An instrument payable "to the estate of M. L., deceased," is held not to be a promissory note. Lyon v. Marshall.[3] In Partridge v. The Bank of England [4] dividend warrants in the form of checks, payable to a particular person, without words making them transferable, were held not transferable by the law merchant. Two cases are relied upon by the learned counsel for the respondent, in support of his position that these interest warrants were negotiable and within the protection accorded by the law merchant to negotiable paper. Smith v. Clark Co.[5] McCoy v. Washington Co.[6] In the case first cited, the principal and the only question really considered by the court was as to the power of the county to issue the bonds. The only notice taken by the court of the point now made was in the remark that the question was settled by the case referred to, reported in 3 Wallace, Jr. That case involved other questions, and this was only incidentally made, and was wholly immaterial for the reason that the party claiming to recover upon the coupons produced the bonds upon the trial. Judge Grier, in his instructions to the jury, charged them that the possession of the coupons was *prima facie* evidence of ownership of the bond.

The contract embodied in these interest warrants, so far as any contract can be implied, cannot, upon principle or within any well-considered authority, be made an exception to the general rules by which the negotiability of promises for the payment of money is determined. There is no usage or custom proved that would give these warrants a negotiable character, even if custom and usage so recent as one applicable to these instruments would be, could change their legal effect. The plaintiff, therefore, acquired no better title to them than his vendor had and could convey, and the transaction was the same in legal effect as the purchase of any article of merchandise from one having no title or authority to sell.

The coupons of the Indianapolis, Bloomington and Western Railway Company being promissory notes, they necessarily had all the characteristics of such instruments, and were entitled to the benefit of the days of grace allowable on bills and notes payable at a given day

[1] 2 Sand. S. C. R. 188.
[2] 2 Hill, 59.
[3] 11 Barb. 241.
[4] 9 Q. B. 396.
[5] 54 Mo. 58.
[6] 3 Wall. Jr. 381

or on time.[1] Having every other quality they cannot be excepted from the general rule which, by commercial usage, sanctioned by law, is applied to every instrument, negotiable in its character, coming within the ordinary definition of bills of exchange or promissory notes. Story on Bills, § 342; Story on Promissory Notes, § 215; Hodges v. Shuler. In the case last cited, the bond itself, to which interest warrants had been attached, was presented at maturity, on the third day of grace, at the place of payment, and, upon payment being refused, the defendants, as indorsers, were notified of the dishonor, and the court held that they were properly charged; all the judges agreeing that the instrument in suit was a promissory note. It does not seem to have been doubted, that, being a promissory note, although something more, it was within the rule allowing days of grace to commercial instruments of that character. If the coupons were not, for the purposes of days of grace, as well as for other purposes, promissory notes, but were payable at a day certain without grace, then, at the time of the purchase by the plaintiff, they were overdue, and the holder conveyed no better title to the plaintiff than he had himself. Chester v. Dorr. It is probably true that they are regarded and treated as well by promisor as promisee as payable at the day, and paid as if, in terms, payable without grace; but this cannot destroy the character or change the legal effect of the instruments, the interpretation of which is for the courts. It is only as negotiable commercial paper that the plaintiff, as a *bona fide* purchaser, could acquire a good title to the coupons from one having no title thereto; and he can only acquire such title by a purchase under the same circumstances that would give him a title to other commercial paper; and if there were no days of grace for the payment of these coupons they could not be transferred so as to give a good title. Upon the findings the plaintiff acquired a good title to the ten coupons, but for the error as to the other coupons, the judgment must be reversed.

Judgment reversed.[2]

[1] Arents v. Commonwealth, 18 Gratt. 750, 758 (*semble*), *contra*. — Ed.

[2] The doctrine that coupons containing negotiable words may be detached from the bond and circulated as independent negotiable instruments has been repeatedly affirmed. Knox Co. v. Aspinwall, 21 How. 539; Thompson v. Lee Co., 3 Wall. 327; City v. Lamson, 9 Wall. 477; Lexington v. Butler, 14 Wall. 282, 295; Clark v. Iowa City, 20 Wall. 583; Hollingsworth v. Detroit, 3 McL. 472; Kennard v. Cass Co., 3 Dill. 147; Cooper v. Thompson, 13 Blatchf. 434; New London Bank v. Ware R. R., 41 Conn. 542. (But see Rose v. Bridgeport, 17 Conn. 243, *contra*.) Eagle v. Kohn, 84 Ill. 292 (*semble*); Jeffersonville v. Patterson, 26 Ind. 15; Town v. Clifford, 53 Ind. 191; Ring v. Johnson Co., 6 Iowa, 265; Atchison v. Butcher, 3 Kas. 104 (*semble*); Commonwealth v. Chesapeake, Co., 32 Md. 501; Spooner v. Holmes, 102 Mass. 503; Haven v. Gr. Junction R. R., 109 Mass. 88; Conn. Co. v. Cleveland R. R., 41 Barb. 9;

Burroughs v. Commissioners, 65 N. C. 284; Beaver v. Armstrong, 44 Pa. 63; North Pa. R. R. v. Adam, 54 Pa. 97; Mayor v. First Bank, 1 Baxter (Tenn.), 402; Mayor v. Potomac Co., 2 Baxter (Tenn.), 296; San Antonio v. Lane, 32 Tex. 405; Sewell v. Brainerd, 38 Vt. 364; Miller v. Rutland R. R., 40 Vt. 399; Arents v. Commonwealth, 18 Gratt. 750.

Coupons, though independent instruments, have been held to be bonds by virtue of the seal upon the bond to which they were originally attached. Accordingly they will be barred only by the statutory limitation to actions upon instruments under seal. City v. Lamson, 9 Wall. 477; Lexington v. Butler, 14 Wall. 282; Clark v. Iowa City, 20 Wall. 583 (*semble*). And *assumpsit* will not lie upon a coupon. Clarke v. Janesville, 1 Biss. 98; except in jurisdictions where *assumpsit* lies upon a sealed instrument. Johnson v. County of Stark, 24 Ill. 75; Mercer Co. v. Hubbard, 45 Ill. 139.

In Gilbough v. Petersburgh R. R., 1 Hughes, C. C. 410, an innocent purchaser for value bought a negotiable bond, to which nine coupons were still attached, just before the maturity of the bond and the last coupon. It was held that he acquired a title to the bond and the last coupon, but not to the eight overdue coupons.

In accordance with the principal case that coupons containing no words of negotiability are not negotiable, are Crosby v. New London R. R., 26 Conn. 121; Myers v. York R. R., 43 Me. 232; Jackson v. York R. R., 48 Me. 147; Wright v. Ohio R. R., 1 Disney, 465. But see, *contra*, McCoy v. Washington Co., 3 Wall Jr. 381; Johnson v. County of Stark, 24 Ill. 75; Smith v. Clark Co., 54 Mo. 58. Conf. Woods v. Lawrence Co., 1 Black, 386; Nat. Bank v. Hartford R. R., 8 R. I. 375; Mills v. Jefferson, 20 Wis. 50.

Coupons are sometimes in the form of bills of exchange. Queensbury v. Culver, 19 Wall. 83. But the form was disregarded, and the drawers of the bills were treated as makers of a note in Mayor v. First Bank, 1 Baxter (Tenn.), 402; Mayor v. Potomac Co., 2 Baxter (Tenn.), 246; Arents v. Commonwealth, 18 Gratt. 750. — Ed.

The pledgee of a bill or note cannot, in the absence of express authority from the pledgor, sell the pledge upon default in payment of the debt thereby secured. Union Co. v. Rigdon (Ill. 1879), 9 C. L. J. 456; Morris Co. v. Lewis, 1 Beav. 328 (*semble*); Wheeler v. Newbould, 16 N. Y. 392; 5 Duer, 29, s. c. But see *contra*, White v. Phelps, 14 Minn. 27 (*semble*); Richardson v. Davis, 5 Pa. L. J. 471 (approved in Davis v. Funk, 39 Pa. 251); Brightman v. Reeves, 21 Tex. 70; and also Donahoe v. Gamble, 38 Cal. 340; Potter v. Thompson, 10 R. I. 1, in which last two cases the sale was after the maturity of the bills.

On the other hand, a bond, being regarded as an article of merchandise, may be sold by the pledgee upon default in payment of the debt for which it is pledged. Donahoe v. Gamble, 38 Cal. 340; Morris Co. v. Lewis, 1 Beas. 328; Brown v. Ward, 3 Duer, 660; Alexander v. Burke, 22 Grat. 254. But see *contra*, Joliet Co. v. Scioto Co., 32 Ill. 348. — Ed.

BILLS OF LADING AND WAREHOUSE RECEIPTS.

A BILL of lading is not infrequently spoken of as a negotiable or *quasi*-negotiable instrument, but it is only by a very loose use of language that a bill of lading can be said to be negotiable. Considered as a contract, a bill of lading is nothing more than an ordinary *chose in action*, and, therefore, in the absence of a statute to the contrary, is at law not even assignable. (Thompson *v.* Dominy, 14 M. & W. 403; Howard *v.* Shepherd, 9 C. B. 297; Baltimore R. R. *v.* Wilkens, 44 Md. 11; Blanchard *v.* Page, 8 Gray, 297, 298; Dows *v.* Cobb, 12 Barb. 310, *semble;* Second Bank *v.* Walbridge, 19 Oh. St. 419, 424, *semble;* Hale *v.* Milwaukee Co., 29 Wis. 482, 497, *semble.*)

A bill of lading is a symbol of property, and its transfer will have the same effect as the transfer of the property itself. Accordingly, if a bill of lading is transferred by an insolvent vendee to a purchaser for value without notice of the insolvency, the right of stoppage *in transitu*, which would otherwise exist in favor of the original vendor, will be defeated. (Lickbarrow *v.* Mason, 2 T. R. 63; Pease *v.* Gloahec, L. R., 1 P. C. 219; Leask *v.* Scott, 2 Q. B. D. 376; The Argentina, L. R., 1 Adm. 370; Lee *v.* Kimball, 45 Me. 172; Tiedemann *v.* Knox, 53 Md. 612; Rowley *v.* Bigelow, 12 Pick. 307; Dows *v.* Greene, 24 N. Y. 638.)

But a transfer of the bill of lading by one having no title to the property will pass no right, either *in rem* or *in personam*, even to a purchaser for value without notice. (Gurney *v.* Behrend, 3 E. & B. 622, 633; Pease *v.* Gloahec, L. R., 1 P. C. 219, 228; Shaw *v.* Railroad Co., 101 U. S. 557; Tison *v.* Howard, 57 Ga. 410; Stollenwerck *v.* Thacher, 115 Mass. 224; Brower *v.* Peabody, 13 N. Y. 121; Dows *v.* Perrin, 16 N. Y. 325; Barnard *v.* Campbell, 55 N. Y. 462, *semble.*)

By 18 & 19 Vict., c. 111, s. 1, the contract contained in the bill of lading has been made to a certain extent assignable, it being therein provided that: "Every consignee of goods named in a bill of lading, and every indorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself." (See The Figlia Maggiore, L. R., 2 Adm. 106; The Felix, L. R., 2 Adm. 273; The Nepoter, L. R., 2 Adm. 375; Short *v.* Simpson, L. R., 1 C. P. 248; Dracachi *v.* Anglo-Egyptian Co., L. R., 3 C. P. 190; Lewis *v.* McKee, L. R., 2 Ex. 37; The Freedom, L. R., 3 P. C. 594.)

In this country statutes have been enacted in many States with regard to the nature and operation of bills of lading and warehouse receipts. But there is no uniformity either in the statutes or in the interpretation given to them by the courts. (See Shaw *v.* Railroad Co., 101 U. S. 557; Burton *v.* Curyea, 40 Ill. 320, n.; Greenbaum *v.* Megibben, 10 Bush, 419; First Bank *v.* Bryce (Ky.), 19 Am. L. Reg., N. S. 503; Tiedemann *v.* Knox, 53 Md. 612; Erie Despatch *v.* St. Louis Co., 6 Mo. App. 172; Merchants' Bank *v.* Union R. R., 69 N. Y. 373; Price *v.* Wisconsin Co., 43 Wis. 267, correcting Hale *v.* Milwaukee Co., 29 Wis. 482, 498.)

LETTERS OF CREDIT.

Letters of credit are sometimes classed with negotiable instruments, but the impropriety of this classification is manifest when their true nature is understood.

A letter of credit is a letter wherein the writer requests the party addressed to do some act, commonly to pay money, for the benefit of a third person, upon the credit of the writer.

The letter of credit may be either special, *i. e.*, addressed to a particular person or persons by name (Birckhead *v.* Brown, 5 Hill, 634; 2 Den. 375, s. c.), or general, *i. e.*, addressed generally to the world at large. (Lawrason *v.* Mason, 3 Cranch, 492.) In either case the letter is a mere offer, which can become a contract only by the acceptance of the offeree.

The offer may by the terms of the letter admit of acceptance by different persons successively, and so give rise to successive contracts (Birckhead *v.* Brown, *supra*; Union Bank *v.* Coster, 3 Comst. 203; Lowry *v.* Adams, 22 Vt. 160); and if, as is common in such cases, the offer is to honor such bills of exchange as shall be drawn upon the writer, and negotiated by the person in whose favor the letter is drawn (*in re* Agra Bank, L. R., 2 Ch. Ap. 391; Russell *v.* Wiggin, 2 Story, 218; Cassell *v.* Dows, 1 Blatchf. 335; Coffman *v.* Campbell, 87 Ill. 98; Lonsdale *v.* Lafayette Bank, 18 Ohio, 126), the writer evidently assumes a liability sufficiently resembling that of the acceptor of a bill of exchange to account for the practice of speaking of a letter of credit as a negotiable instrument.

But a letter of credit and an acceptance differ fundamentally from each other. An acceptor makes a contract with the payee, but with no subsequent holder. He is liable, of course, to subsequent holders, but this is because his original obligation to the payee is transferable with the bill to all subsequent holders, and that, too, without regard to their knowledge or ignorance of the acceptance. One who issues a letter of credit, on the other hand, makes a distinct contract with each holder who takes the bill on the faith of the letter, *i. e.*, with each holder who accepts the offer contained in the letter, and these distinct contracts are no more negotiable than any other *chose in actio*.

CERTIFICATES OF STOCK.

SHARES in a stock company are commonly made by statute transferable on the books of the company. The certificates, however, usually have a printed blank form of transfer and power of attorney upon the back of the instrument, and by custom the party to whom the certificate is issued transfers his interest by signing this blank form, which is commonly under seal, and delivering the certificate to his transferee, who in turn transfers his interest by a simple delivery of the certificate.

A transfer in this mode is deemed sufficient in some jurisdictions to pass the legal title to the stock subject to the claims of the company upon the registered stockholder. Duke *v.* Cahawba Co., 10 Ala. 82; Commercial Bank *v.* Kortwright, 22 Wend. 348; Leitch *v.* Wells, 48 N. Y. 585; Cushman *v.* Thayer Co., 76 N. Y. 365, 371. While in others such a transfer gives the transferee merely the equitable interest in the stock. Black *v.* Zacharie, 3 How. 483, 518; Brown *v.* Adams, 5 Biss. 181.

The true view, it is submitted, is that such a transfer does not pass the legal title, but that it passes the equitable interest, coupled with irrevocable power to acquire the legal title. This view avoids the objection of disregarding the language of the statute prescribing the mode of transfer and also explains the decisions in Redfearn *v.* Ferrier, 1 Dow, 50, and Dodds *v.* Hills, 2 H. & M. 424, where a purchaser for value from a trustee of stock without notice of the trust was allowed to retain the stock, although before registration he learned of the trust.

In certain cases this irrevocable power to obtain the legal title may be acquired by the delivery of the certificate from one who has no such power himself; *e. g.*, from an agent who has been intrusted with the certificate for a special purpose, and who, in violation of his instructions, transfers it to a purchaser for value without notice. Thomson *v.* Toland, 48 Cal. 99; Stone *v.* Marye, 14 Nev. 362; Mt. Holly *v.* Turnpike Co., 2 C. E. Green, 117; Prall *v.* Tilt, 28 N. J. Eq. 479; Commercial Bank *v.* Kortwright, 22 Wend. 348; Fatman *v.* Lobach, 1 Duer, 854; McNeil *v.* Tenth Bank, 46 N. Y. 325 (compare Merchant's Bank *v.* Livingston, 74 N. Y. 223); Penn. R. R. Co.'s Appeal, 86 Pa. 80; Wood's Appeal (Pa. 1880), 10 Reporter, 125; State Bank *v.* Cox, 11 Rich. Eq. 344; Fraser *v.* Charleston, 11 S. Ca. N. S. 486. See also Jarvis *v.* Rogers, 13 Mass. 105; 15 Mass. 389. In England, however the courts have not sanctioned the mercantile custom of transferring shares by a deed executed in blank. Accordingly one to whom a certificate is offered with a blank form of transfer under seal can acquire no greater interest than his assignor possesses. Tayler *v.* Great Indian Co., 4 DeG. & J. 559.

The fact that the possession of the transferror warrants the purchaser in dealing with him as owner has given rise to the erroneous notion that certificates of stock are negotiable instruments, transferable by delivery. Whether the custom of merchants will ever lead the courts to give those instruments the quality of negotiability may be an open question; but that they have not yet done so is clear. The cases above mentioned proceeded upon the doctrine of estoppel, the true owner not being permitted to show that one whom he had intrusted with the indicia of ownership of the stock had not the *jus disponendi*. If certificates of stock were negotiable instruments by delivery, one who bought in good faith of a thief or finder would prevail over the true owner. But the authorities furnish no warrant for such a doctrine. See Anderson *v.* Nicholas, 28 N. Y. 600, 604; Biddle *v.* Bayard, 13 Pa. 150; Pennsylvania Co.'s Appeal, 86 Pa. 80, 83; Wood's Appeal (Pa. 1880), 10 Reporter, 125; Aull *v.* Colket, 2 W. N. (Pa.) 322.

APPENDIX.

NOTE TO WOODRUFF *v.* MOORE, *supra*, p. 90.

Webster *v.* Kirk, 17 Q. B. 944; Scarpellini *v.* Atcheson, 7 Q. B. 864 (*semble*); Hunt *v.* Taylor, 108 Mass. 508; Kennedy *v.* Carpenter, 2 Whart. 344, *accord.*

Bowman *v.* Wright, 7 Bush, 375; Godfrey *v.* Rice, 59 Me. 308; Bullock *v.* Campbell, 9 Gill, 182; Butler *v.* Wright, 20 Johns. 367; 6 Wend. 284; Barker *v.* Cassidy, 16 Barb. 177, *contra.*

Consistently with the decision in the principal case, an indorser who takes up a bill or note cannot charge a prior party upon the common count for money paid. See to this effect, Cowley *v.* Dunlop, 7 T. R. 565; Woodruff *v.* Moore, II. 90; Kennedy *v.* Carpenter, 2 Whart. 344; Williams *v.* Durst, 25 Tex. 667. But see *contra*, Pownal *v.* Ferrand, 6 B. & C. 439; *Ex parte* Bishop, 15 Ch. D. 400 (*semble*); Frazer *v.* Carpenter, 2 McL. 235; Parker *v.* Sanborn, 7 Gray, 191 (*semble*); Barker *v.* Parker, 10 Gray, 339; Rushworth *v.* Moore, 36 N. H. 188; Butler *v.* Wright, 2 Wend. 369.

The cases *contra*, just cited, it is submitted, cannot be sustained upon principle. The right of a surety who pays for his principal to reimbursement may be founded either upon an express agreement or upon a contract implied in law. But the whole foundation for an implied contract is wanting when the principal has given a direct objection to the surety, as in the cases under discussion. Furthermore, the contract implied in law does not express the true obligation of the prior party to the indorser; for if an indorser should pay a bill when he was no longer liable upon it, — *e. g.*, when the holder had failed to notify him of its dishonor, — the count for money paid could not be maintained. Sleigh *v.* Sleigh, 5 Ex. 514. And if an indorser should take up a note by paying less than its face value, he could obviously, in a count for money paid, recover only what he paid; and yet in both cases the indorser might recover upon the bill the face value.

But the action of an accommodation party against a subsequent party for indemnity, being collateral to the bill or note, the statute begins to run against him only from the time of payment. Reynolds *v.* Doyle, 1 M. & G. 753; Collinge *v.* Heywood, 9 A. & E. 633.

The same distinction is illustrated by the decisions under the English bankruptcy statutes of the last century. Under these statutes a debt to be provable must have existed at the time of the act of bankruptcy, a bill or note or bond being treated as a debt to the holder from the time the bankrupt became a party to the instrument. An accommodation acceptor, therefore, who had not taken up the bill by that time could not, by subsequently paying the bill to a holder entitled to prove against the bankrupt, obtain the right to prove himself; and on the other hand his subsequently arising claim, not being provable, was not barred by the bankrupt's certificate. Chilton *v.* Whiffin, 3 Wils. 13; Young *v.* Hockley, 3 Wils. 346; Vanderheyden *v.* De Paiba, 3 Wils. 528; *Ex parte* Lloyd, 1 Rose, 4, 6. And even under the Statute 49 Geo. III., by which the law was so far changed as to give a surety, *e. g.*, an acceptor, the right

to prove his contingent claim against the principal (*Ex parte* Yonge, 8 V. & B. 40; Stedman *v.* Martinnant, 13 East, 427; Van Sandau *v.* Corsbie, 3 B. & Al. 13; Bassett *v.* Dodgin, 9 Bing. 653; Haigh *v.* Jackson, 3 M. & W. 598), an accommodation acceptor could not be a petitioning creditor unless he had paid the bill before the act of bankruptcy. *Ex parte* Holding, 1 Gl. & J. 97.

But an indorser who took up a bill under similar circumstances could prove against the bankrupt; for the payment by the indorser was not the creation of a new debt, but simply the retransfer of the old debt created by the bankrupt before his bankruptcy. *Ex parte* Brymer, 1 Cooke, B. L. (8th ed.) 187; *Ex parte* Seldon, 1 Cooke, B. L. (8th ed.) 188; Joseph *v.* Orme, 2 B. & P. N. R. 180; Houle *v.* Baxter, 3 East, 177; *Ex parte* Cyrus, L. R. 5 Ch. 176. Or such an indorser might, instead of proving the bill, use it as a set-off in an action by the bankrupt's assignees. Collins *v.* Jones, 10 B. & C. 777; McKinnon *v.* Armstrong, 2 App. Cas. 531. (See also *Ex parte* Thomas, 1 Atk. 78; Bingley *v.* Mallison, 3 Doug. 333; Anon., 2 Wils. 135; Glaiston *v.* Hewer, 7 T. R. 498; *Ex parte* Reyers, Buck, 490, in which cases bills issued by the bankrupt before, but transferred to the holder after the act of bankruptcy, were held to be provable by the holder.) And by the same principle the certificate of the bankrupt was a bar to any subsequent action by the indorser whether he had taken up the bill before or after the certificate was obtained. Cowley *v.* Dunlop, 7 T. R. 565 (approved in Bucklin *v.* Buttivant, 3 East, 72, and overruling Howis *v.* Wiggins, 4 T. R. 714; Brooks *v.* Roger, 1 H. Bl. 640); Houle *v.* Baxter, 3 East, 177; Mead *v.* Braham, 3 M. & Sel. 91; Walker *v.* Pilbeam, 4 C. B. 229.

MACDONALD *v.* BOVINGTON.

In the King's Bench, June 27, 1792.

[*Reported in* 4 *Term Reports*, 825.]

The plaintiff drew a bill of exchange for £20 on the defendant, which the latter accepted; and which afterwards got into the hands of Thompson, who recovered against the defendant, as acceptor, and charged him in execution. The defendant having obtained his discharge under the lord's act in that suit, Thompson then sued this plaintiff as drawer, and recovered the amount of the bill; on which the plaintiff sued the defendant, on his acceptance, and charged him in execution. It was contended, on a rule to discharge the defendant out of custody, that he had satisfied the debt by being charged in execution at the suit of Thompson, and that he was not liable to be sued again for the same sum. But

Lord Kenyon, C. J., said: Nothing could be clearer than that this was not a satisfaction of the debt as between these parties, though it was as to Thompson. That it was a mere formal satisfaction, even to the holder, not like actual payment. That this plaintiff, having been obliged to pay the amount of the bill since the defendant was charged in execution at the suit of Thompson, had a right to have recourse to this defendant as acceptor; for that, by his payment, a new cause of action arose against the defendant, which he might enforce without regard to what passed in the former action.

Buller, J. The consequence of the defendant's not being liable in this action would be this, that, because the drawer was obliged to pay the holder of the bill, the acceptor would be discharged without paying either.

Rule discharged.

INDEX AND SUMMARY.

A.

ABSCONDING } of acceptor or maker. (See DILIGENCE DISPENSED WITH,
ABSENCE } WHEN. § 9.)

ACCEPTANCE, FORMAL REQUISITES OF. (See ACCEPTANCE FOR HONOR.)

AN ACCEPTANCE MUST BE ACCORDING TO THE TENOR OF THE BILL.

1. A bill contains in express terms only an order to pay, but by the custom of merchants the drawer also orders the drawee to accept the bill upon presentment, *i. e.*, to promise to pay it according to the terms of the order. A bill, therefore, is dishonored if the drawee either refuses to accept it (Milford *v.* Mayor, II. 121, n. 1; Whitehead *v.* Walker, II. 142, 149, n. 1); or gives an acceptance which does not follow the tenor of the order. (Boehm *v.* Garcias, I. 155.)
2. And although it is held that the drawee may bind himself within the custom of merchants by an acceptance varying from the tenor of the bill, *e.g.*, by

a partial acceptance (Petit *v.* Benson, I. 146, 147, n. 1);

or a conditional acceptance (Smith *v.* Abbot, I. 152, 153, n. 1; Moor *v.* Whithy, I. 153; see Anderson *v.* Hick, I. 155; Langston *v.* Corney, I. 156);

or an acceptance qualified as to the mode or time of payment (Petit *v.* Benson, I. 146; Walker *v.* Atwood, I. 152); yet a holder takes an acceptance varying from the tenor of the bill at the risk of discharging the drawer and indorsers. (I. 150, last paragraph of note.) The discharge of the drawer and indorsers follows from the doctrine peculiar to England and this country, — that a drawer or indorser of a bill dishonored for non-acceptance cannot be charged by reason of its subsequent dishonor for non-payment. (Milford *v.* Mayor, II. 121 n.; Ballingalls *v.* Gloster, II. 121, 123, n. 1; Whitehead *v.* Walker, II. 142.)

AN ACCEPTANCE SHOULD BE WRITTEN UPON THE BILL.

3. The obligation of the acceptor, like that of all other parties to negotiable paper, should appear on the bill itself. This principle, which has long been recognized upon the continent of Europe, was, in 1856, embodied in the English statute, 19 & 20 Vict. c. 57; I. 186.
4. The prior decisions, in which it was held that

an unsigned acceptance, as by the word "accepted," or words of equivalent import, written upon the bill without the drawee's signature (Dufaur *v.* Oxenden, I. 163; Mason *v.* Rumsey, II. 554, n. 2; see Anon., I. 146; Powell *v.* Monnier, I. 169, 170);

ACCEPTANCE, FORMAL REQUISITES OF — *continued.*

or a promise to pay contained in a separate instrument (Powell *v.* Monnier, I. 169; Wynne *v.* Raikes, I. 174, 179, n. 2);

or even an oral promise to pay (Lumley *v.* Palmer, I. 168, and n. 2; I. 173), was a valid acceptance, are valuable only as illustrations of the reluctance of the courts to recognize the true nature of a bill of exchange as a mercantile specialty. See I. 180, n. 1.

5. In the United States the law upon the subject of acceptances is in an extremely unsatisfactory condition. Not only is

an unsigned acceptance (II. 554–555, n. 2),

or a promise to pay contained in a separate instrument (I. 179, n. 2; Spaulding *v.* Andrews, I. 193; see Exchange Bank *v.* Rice, I. 195);

or, in most of the States, a merely oral promise to pay (I. 168, n. 2, but see I. 186, n. 1), treated as a valid acceptance of a bill already drawn;

but also, as it is universally held, a bill may be virtually accepted before it is drawn. The conditions of these so called "virtual acceptances" are, (1) that the contemplated drawee shall, in a letter describing the bill to be drawn, promise to accept it; (2) that the bill shall be drawn in a reasonable time after the letter is written; and (3) that the holder shall take the bill upon the credit of the letter. (Coolidge *v.* Payson, I. 187, 192, n. 2; Exchange Bank *v.* Rice, I. 195, 198.) This doctrine, which had its origin in the opinion of Lord Mansfield in Pillans *v.* Van Mierop. I. 172, n. 2, and which is obviously based upon no principle either of the law-merchant or of the common law, was distinctly repudiated by the English courts in Johnson *v.* Collings, I. 171; Bank of Ireland *v.* Archer, I. 180, 185, n. 1, and has been viewed in this country as a deplorable anomaly. (I. 192, n. 2.)

6. An acceptance of a bill already drawn, by an extrinsic written, or by an oral promise to pay, is, in the jurisdictions in which such an acceptance is valid, to all intents and purposes equivalent to an acceptance in writing upon the bill. Accordingly the promise to pay may be made to a plaintiff after he becomes the holder of the bill (I. 168, n. 2; I. 179, n. 2); or to any other party to the bill either before or after the transfer of the bill to the plaintiff. (Wynne *v.* Raikes, I. 174, 179, n. 2; Bank of Ireland *v.* Archer, I. 180; Spaulding *v.* Andrews, I. 193, 194, n. 2.)

The decision in Exchange Bank *v.* Rice, I. 195, *contra*, is much to be regretted both as extending to the acceptance of existing bills the anomaly of "virtual acceptances" of non-existing bills, whereby there may be several indorsees with different remedies, and as lending countenance to an arbitrary distinction. For it was held in that case that the plaintiff could not charge the drawee as acceptor upon an extrinsic promise to pay made to the drawer after the bill had been negotiated to the plaintiff, because the plaintiff did not take the bill upon the credit of the promise; and yet it was conceded that, upon a similar promise made to the plaintiff himself after he acquired the bill, he might have charged the drawee as acceptor, although the argument that the plaintiff did not take the bill upon the credit of the promise would be equally cogent in both cases.

7. An extrinsic acceptance of an existing bill may be established by any words importing a promise to pay. (Powell *v.* Jones, I. 154, and n. 2.)

ACCEPTANCE, FORMAL REQUISITES OF — *continued.*

8. It was once ruled that the wrongful retention or destruction of a bill by the drawee, to whom it had been presented for acceptance, was of itself an acceptance (Harvey *v.* Martin, I. 158, n. 1); but this view was properly overruled. (Jeune *v.* Ward, I. 157, 163, n. 1.)

9. In England and in the States of this country, where by statute an acceptance must be written upon the bill,

a drawee may be charged as acceptor although he writes merely his name upon the bill; for any one taking the bill has the right to fill up such a blank acceptance, on the same principle that any holder may fill up a blank indorsement. (Spear *v.* Pratt, I. 165, 166, n. 1.) The case of Hindhaugh *v.* Blakey, 3 C. P. D. 136; I. 166, n. 1, is *contra*, but the effect of this decision was at once corrected by Stat. 41 & 42 Vict. c. 13; I. 186. See also Steele *v.* McKinlay, 5 App. Cas. 754.

Similarly the blank acceptance of a skeleton bill is valid within the statute (Leslie *v.* Hastings, I. 164), the acceptance taking effect by relation from the time of delivery to the payee, although not filled up until afterwards. *Ex parte* Bartlett, 3 De G. & J. 378.

AN ACCEPTANCE MUST BE BY THE DRAWEE.

10. No one but the drawee can accept a bill unless for honor. Jackson *v.* Hudson, I. 201, 202, n. 1; Davis *v.* Clarke, I. 202.

11. Accordingly a bill addressed to an agent cannot be accepted in behalf of his principal nor *vice versa*. (I. 206, n. 1.) But a bill addressed to an agent and accepted by him in behalf of a partnership or unincorporated company, of which he is himself a member, is considered to be accepted according to the tenor of the bill. So much of the acceptance as relates to his associates is surplusage if inserted without authority, and renders them liable as makers of a note, if inserted with their authority. (I. 206, n. 1.)

On the other hand, an unauthorized acceptance of a bill addressed to a partnership or unincorporated company is not an acceptance by the principal, and the bill is therefore dishonored. The agent, however, may be charged individually as acceptor. (Owen *v.* Van Uster, I. 204.) But it would seem to be more correct to charge the agent in such cases as the maker of a note.

12. There would seem to be no reason why a stranger who writes what purports to be an acceptance should not be charged as the maker of a note. But see Davis *v.* Clarke, I. 203; Malcolmson *v.* Malcolmson, 1 L. R Ir. 228.

TIME OF ACCEPTANCE.

13. The drawee has twenty-four hours after the presentment of the bill in which to decide whether to accept it or not. (II. 363, n.)

14 The drawee may render himself liable as acceptor although he has once refused to accept the bill. (I. 151, n. 1.) But such an acceptance discharges the drawer and indorsers unless they assent to it. See *supra*, § 2.

15 An acceptance to be according to the tenor of the bill must be made before its maturity, but the drawee may bind himself by an acceptance after its dishonor for non-payment (Jackson *v.* Pigott, I. 151, and n. 1; Wynne *v.* Raikes, I. 174, 179); the promise of the acceptor being construed as a promise to pay upon demand.

ACCEPTANCE, FORMAL REQUISITES OF — *continued.*

AN ACCEPTANCE IS COMPLETE WITHOUT DELIVERY.

16. The delivery of a bill or note is necessary only for the purpose of creating or transferring a title. An acceptance has no effect upon the title to the bill, and is therefore complete the moment it is written upon the bill, *animo contrahendi*. (Wilde *v.* Sheridan, I. 214, 218, n. 1, *semble*.)

Consistently with this view, a subsequent cancellation before delivery would be nugatory, and it is conceived that the opinion of Lord Kenyon and Lord Ellenborough to this effect in Bentinck *v.* Dorrien, I. 207, Thornton *v.* Dick, I. 210, n. 1, is more in accordance with the custom of merchants than the case of Cox *v.* Troy, I. 209, 214, n. 1, which overruled this opinion.

ACCEPTANCE FOR HONOR OR SUPRA PROTEST. (See ACCEPTOR FOR HONOR; PAYMENT SUPRA PROTEST.)

1. A bill that has been protested, whether for non-acceptance, or for better security after acceptance (*Ex parte* Wackerbath, 5 Ves. 574), may be accepted for the honor of the drawer, or any one or more of the indorsers.
2. An acceptance for honor differs formally from an ordinary acceptance in two respects: It must contain a statement of the fact of protest (Williams *v.* Germaine, II. 42, 43; Mitchell *v.* Baring, 10 B. & C. 4; Schofield *v.* Bayard, 3 Wend. 488, 489);

and it must be the act of a stranger; but a drawee may as a stranger accept a bill for honor which as drawee he has rightfully declined to accept. (Schimmelpennich *v.* Bayard, 1 Pet. 264; Konig *v.* Bayard, 1 Pet. 250; Baring *v.* Clark, 19 Pick. 220.)

It was said in Hoare *v.* Cazenove, 16 East, 395, that the acceptance for honor might be in a separate instrument, but this is believed to be inconsistent with the custom of merchants.

ACCEPTANCE WAIVED.

What the expression means. (II. 111, n. 1; II. 149, n. 1.)

ACCEPTOR. LIABILITY OF, TO DRAWER. (See also ACCEPTOR AND MAKER.)

1. A drawee, by accepting a bill, assumes a twofold obligation, binding himself to the payee and also to the drawer for the due payment of the bill to the payee or his order. (Simmonds *v.* Parminter, II. 527.)

While it is true that the due performance of the obligation to the one is also a performance of the obligation to the other, nevertheless the two obligations differ in important respects.

In the first place, the obligation to the payee is negotiable, whereas the obligation to the drawer is not negotiable.

Secondly, the damages for the breach of the obligation to the payee are measured by the face of the bill and interest, whereas the acceptor is bound to pay the drawer not only the face of the bill but also all damages which he may have incurred by reason of being obliged to take up the bill, *e.g.*, re-exchange. (Walker *v.* Hamilton, II. 66.)

Thirdly, it has been decided that the claim of the payee is so far distinct from that of the drawer that a discharge of acceptor under the Lords' Act in an action by payee or subsequent holder is no bar to a subsequent action by the drawer. (MacDonald *v.* Bovington, II. 786.)

ACCEPTOR AND MAKER. Liability of, to Payee and Subsequent Holders.

1. With reference to the payee and subsequent holders, the liability of an acceptor and maker is identical. Each makes a direct promise to the payee to pay the bill or note according to its tenor at the time of signing. The acceptor's liability is therefore not affected

by a forgery of the drawer's signature (Jenys *v.* Fawler, I. 399; Price *v.* Neal, I. 407; Bass *v.* Clive, I. 466);

nor by the forgery of a collateral document (*e.g.*, a bill of lading), upon the strength of which the acceptance was given. (Thiedemann *v.* Goldschmidt, I. 534.)

It seems equally clear, upon principle, that an alteration of any of the terms of an originally genuine bill should not affect the liability of the acceptor to an innocent payee if the bill was accepted after the alteration. (See Langton *v.* Lazarus, I. 495. But see as to certified checks, *infra*, Checks, § 10.)

Nature and Extent of the Liability.

2. An acceptor or maker is bound, according to the law-merchant, to honor his bill or note, — that is, to pay it upon its presentment and surrender by the holder at the designated place of payment (or at the residence or place of business of the acceptor or maker, if no other place is specified in the instrument), — at any reasonable hour of the day of maturity, or of any subsequent day if not presented when due.

3. The obligation of an acceptor or maker differs, therefore, from that of an ordinary debtor in three respects: —

In the first place, the obligation of the acceptor or maker to pay his acceptance or note is conditional upon the performance by the holder of the concurrent act of presentment and surrender of the instrument of indebtedness; whereas the liability of an ordinary debtor is subject to no such condition.

Secondly, an acceptance or note, not expressly payable at a particular place, is to be paid at the residence or place of business of the acceptor or maker; whereas, in the case of an ordinary debt, the debtor must seek the creditor.

Thirdly, it is for the holder to determine at what moment of the day of maturity an acceptance or note shall become payable, and he must exercise his option in a reasonable manner, that is, either during business hours or between the customary hours of rising and retiring, accordingly as payment is demanded at the place of business or at the residence of the acceptor or maker; on the other hand, it is for the debtor to fix the moment of payment of an ordinary debt, and he has regularly the whole day until midnight in which to exercise his option, without regard to the convenience of his creditor.

4. Upon the continent of Europe full effect has been given to the custom of merchants, and the law in regard to the obligation of an acceptor or maker is simple and consistent. In England and this country, however, the courts have in some cases adopted the principle of the law-merchant, while in others they have manifested a singular reluctance to recognize any distinction between the obligation of a negotiable instrument and that of an ordinary debt. The consequent inconsistency in their deci-

ACCEPTOR AND MAKER — *continued.*

sions, which was as needless as it is glaring, will appear from the following summary of the authorities.

Necessity of Presentment.

5. It is held on the one hand, in conformity with the law-merchant, first, that if the holder will not tender the bill or note to the acceptor or maker he is not entitled to payment (Hansard *v.* Robinson, II. 38, 41; Ramuz *v.* Crowe, II. 62, 64); and if after receiving payment he refuses to surrender the instrument, the acceptor or maker may recover the money paid, or, as it has been held, may maintain trover for the instrument. (II. 41. n. 1.)

6. Secondly, the rule prevails generally that in the absence of a statute no action will lie against an acceptor or maker where a surrender has become impossible by reason of the loss or destruction of the instrument (Pierson *v.* Hutchinson, II. 18, 19, n. 1; II. 64, n. 10; see II. 41–42, n. 2);

whether the loss was before or after maturity (Hansard *v.* Robinson, II. 38, 42, n. 1);

or whether the instrument was negotiable by delivery, or only by indorsement. (Ramuz *v.* Crowe, II. 62, 64, n. 10.)

In equity, however, a holder may recover the amount of a lost or destroyed bill or note upon giving the acceptor or maker adequate indemnity against subsequent liability thereupon (II. 41, n. 2; see II. 65, last ¶ of note);

and this equitable relief is now, by virtue of statutes, obtainable in England and some of the States in this country, in the courts of common law. (II. 19, n. 1.)

In some States, indeed, the courts of common law have not scrupled to assume the powers of a court of equity, without the aid of a statute (II. 19, n. 1, 2d ¶);

while in others a holder has been permitted to recover at law without giving any indemnity, upon proof of the destruction of the bill or note (II. 64, n. 10);

or upon proof that a lost bill or note was at the time of loss either overdue (II. 42, n. 1, 2d ¶);

or negotiable only by indorsement, and unindorsed. (II. 64, n. 10, 2d ¶.)

7. Thirdly, a holder cannot establish the dishonor of a bill or note, and a consequent right of action against a drawer or indorser, except by showing the acceptor's or maker's failure to pay upon presentment. (See DRAWER AND INDORSER, § 2.)

8. Fourthly, presentment for payment is indispensable to an action by the holder against the maker of a note payable at a particular place. (II. 93, n. 1; Sanderson *v.* Bowes, II. 5; see Williams *v.* Waring, II. 48.)

A contrary rule obtains in this country (Carter *v.* Smith, II. 92, 94, n. 3); but the American cases seem to have originated in a thorough misconception of the state of the English authorities (II. 93, n. 1); nor is the American rule applied consistently, presentment being held necessary if a note is payable on demand at a particular place. (II. 11, n. 1.)

Prior to Onslow's Act (1 and 2 Geo. IV. c. 78), presentment for payment was equally necessary to charge the acceptor of a bill drawn payable at a particular place (Hodge *v.* Fillis, II. 16, 17, n. 1);

or the acceptor of a bill accepted payable at a particular place. (Rowe *v.* Young, II. 22, 32, n. 1.)

ACCEPTOR AND MAKER — *continued.*

But that statute (II. 32, n. 1) has rendered a presentment unnecessary in the case of qualified acceptances, and it has been held, but it is believed unwarrantably, that the statute applied equally to a general acceptance of a bill drawn payable at a particular place. (Selby *v.* Eden, II. 34.)

In this country it is highly probable that the courts would not hesitate to lay down the same rule in both classes of cases without the help of a statute. (See II. 17, n. 1.)

9. Fifthly, presentment for payment is indispensable to the maintenance of an action against the acceptor or maker of a bill or note payable at or after sight. (Dixon *v.* Nuttall, II. 55; but see II. 57, n. 1.)

10. Sixthly, interest does not begin to run against an acceptor or maker until after presentment, whether the paper is payable at a fixed date, (Anon., II. 1, and n. 1);

or on demand. (Upton *v.* Ferrers, II. 3 and n. 4.)

This rule was recognized in Pierce *v.* Fothergill, II. 57, although it was erroneously held that the bringing of a suit was equivalent to a demand. (See II. 61, n. 2, 2d ¶.)

11. On the other hand, it is settled law, first, that an action may be maintained against the acceptor or maker of a bill or note payable at a fixed date, if not payable also at a particular place, at any time after midnight of the day of maturity; and the statute of limitations begins to run from that time, although the instrument has not been presented for payment and is not dishonored in the eyes of merchants.

Accordingly the precedents of declarations contain no allegation of presentment to the acceptor or maker (2 Chitty, Pleading, 7th ed., 100, 105);

the plea of tender is construed as strictly as in the case of an ordinary debt (Poole *v.* Crompton, II. 36; but see DRAWER AND INDORSER, § 5);

and although presentment and payment are so far treated as concurrent conditions that no action can be maintained against an acceptor or maker upon a lost or destroyed instrument (*supra*, § 6), the loss or destruction must nevertheless be pleaded as an affirmative defense. (Blackie *v.* Pidding, II. 65.)

But if an action is brought upon the day of maturity, a presentment must be avowed and proved. (Veazie Bank *v.* Winn, II. 95, 96, n. 3.)

12. Secondly, even if paper not payable at a particular place is expressly payable on demand, no presentment is necessary, but an action accrues, and the statute of limitations begins to run from the moment of issue. (Norton *v.* Ellam, II. 60, 61, n. 2.)

But the courts, shrinking from the logical results of their anomalous doctrine, have declined to apply it to

bank notes (II. 62, n. 2);

or to certificates of deposit (II. 62, n. 2);

or to stock subscription notes of members of a corporation (Bigelow *v.* Libby, 117 Mass. 359; Kilbreath *v.* Gaylord, 34 Ohio St. 305; Moses *v.* Ocoe Bank, 1 Lea, 398; see, however, Price *v.* Yates, 19 Alb. L. J. 295);

or to paper payable at a fixed time after demand. (Thorpe *v.* Booth, II. 33.)

ACCEPTOR AND MAKER — *continued.*

PLACE OF PAYMENT.

13. It is held, in accordance with the custom of merchants, that a holder cannot establish the dishonor of a bill or note, in which the place of payment is not named, and a consequent right of action against a drawer or indorser, without proof of presentment for payment at the acceptor's or maker's residence or place of business.

(See DRAWER AND INDORSER, § 2.)

Questions growing out of the conflict of laws, and governed by the *lex loci solutionis*, would, it is believed, be determined by the law of the place of the acceptor or maker, and not by that of the holder. See *Ex parte* Heidelback, II. 245.

14. On the other hand, the anomalous doctrine that no presentment is necessary to charge the acceptor or maker of paper payable generally, either at a fixed date or on demand, seems to have been deduced as a corollary from the rule applicable to ordinary debts, whereby the debtor is required to seek the creditor. The monstrous injustice of applying this rule to negotiable paper is palpable, especially when it is remembered that the successive holders are under no obligation to notify the acceptor or maker of the transfer of the instrument to them. (Anon., II. 2.)

TIME OF PAYMENT.

15. The custom of merchants has been generally recognized as to the time of payment. Accordingly, if a bill or note has been presented for payment at a reasonable hour on the day of maturity, that is, during business hours, or between the usual hours of rising and retiring, according to the place of presentment, and payment has been refused, the paper is dishonored, and the holder may at once send notice of dishonor to the drawer and indorser (*Ex parte* Moline, II. 422, and n. 1; Burbridge *v.* Manners, I. 465), and may immediately begin an action against the acceptor or maker. (Veazie Bank *v.* Winn, II. 95, n. 4; but see Osborn *v.* Moncure, II. 86, *contra.*)

AMOUNT OF PAYMENT.

16. An acceptor or maker is bound to pay the amount specified in the bill or note, or, if default is made at the maturity of the paper, interest at the rate of the *locus solutionis* must be added. (II. 256, n. 1.)

But there is no liability to reimburse an indorser for costs incurred in unsuccessfully defending an action against himself (Simpson *v.* Griffin, II. 84), nor for other damage, *e. g.*, re-exchange (Woolsey *v.* Crawford, II. 68, n. 3), or notarial expenses in charging a drawer or indorser. But see II. 206, n. 2, *contra.*

ACCEPTOR FOR HONOR, OR SUPRA PROTEST. (See ACCEPTANCE FOR HONOR, PAYMENT SUPRA PROTEST.)

One who has accepted a bill for the honor of another, although nominally an acceptor, assumes in reality the liability of an indorser, being bound to pay the bill to any holder subsequent to him for whose honor he has intervened, if the bill is duly presented for payment to the drawee, protested for non-payment, and due notice of its dishonor given to himself. (Williams *v.* Germaine, II. 42, 48, n. 1.)

ACCOMMODATION PAPER. (See also CROSS ACCEPTANCES.)

Accommodating party not liable to party accommodated (DEFENSES, § 5),

ACCOMMODATION PAPER — *continued.*
but to all other holders, although holders without value and with notice (DEFENSES, § 5; PAYMENT SUPRA PROTEST), — and cannot therefore charge accommodated party with costs of an unsuccessful defense. (II. 84, n. 1.)
Pledgee of, cannot recover more than the debt secured (DEFENSES, § 5), but may *prove* in bankruptcy for the face of the bill. (I. 324, 780; *Ex parte* Newton, 16 Ch. D. 330.)
Liability of accommodating party when paper is not transferred before maturity. (OVERDUE PAPER, § 5.)
Liability of accommodated maker to accommodating payee who has taken up the note for less than its face value. (I. 330, n. 1.)
Accommodation acceptor cannot sue drawer upon the bill. (II. 531, 532, n. 1.)
Accommodated drawer or indorser chargeable without presentment and notice of dishonor. (DILIGENCE, DISPENSED WITH, WHEN, § 8.)
Partner has no implied power to sign firm name by way of accommodation. (I. 741, n. 3.)
Made for benefit of bankrupt does not pass to his assignee. (TRANSFER, §§ 13, 16.)
Parties to, when discharged as sureties. (DEFENSES, § 5.)
Extinguishment of. (EXTINGUISHMENT, §§ 10, 19.)
Holder of, when affected with notice of accommodation. (PURCHASE FOR VALUE, §§ 16, 17.)
Power to negotiate, is not revoked by the death of the accommodating party. (Clark *v.* Thayer, 105 Mass. 216. See Hatch *v.* Searles, I. 718.)
Negotiation of, by party accommodated is a sale of credit, and not a usurious loan. (USURY.)
Mutual exchange of. (See CROSS-BILLS AND ACCEPTANCES.)
ACCORD AND SATISFACTION.
Is a personal defense. (DEFENSES, § 5.)
Does not affect title of purchaser for value without notice (PURCHASE FOR VALUE, § 4) — unless the transfer is after maturity. (OVERDUE PAPER, § 4.)
ACTION ON A BILL OR NOTE.
Cause of, accrues when. (ACCEPTOR AND MAKER, §§ 11, 15; DRAWER AND INDORSER, § 6.)
Proper parties to. (SPECIALTY, § 2: TRANSFER, §§ 12, 19.)
Form of. (SPECIALTY, §§ 4, 5.)
ADDRESS.
Necessity of, in a bill. (I. 145.)
Mode of. (NOTICE OF DISHONOR, § 25.)
ADMINISTRATOR. (See EXECUTOR.)
ADMINISTRATION.
Where bills are *bona notabilia.* (CHATTELS, § 5.)
AGENT.
Presentment by. (PRESENTMENT FOR ACCEPTANCE, § 4; PRESENTMENT FOR PAYMENT, § 16.)
Presentment to. (PRESENTMENT FOR ACCEPTANCE, § 5; PRESENTMENT FOR PAYMENT, § 17.)
Notice by. (NOTICE OF DISHONOR, § 28.)

AGENT — *continued.*
Notice to. (NOTICE OF DISHONOR, § 30.)
Payment to. (EXTINGUISHMENT, § 14.)
Unauthorized indorsement by. (PURCHASE FOR VALUE, § 2 (*b*).)
Signing in his own name without disclosing agency is alone liable. (SPECIALTY, § 2; I. 206 n. 1.)
For collection. (See COLLECTION, AGENCY FOR.)
AGREEMENTS. (See COLLATERAL AGREEMENTS.)
ALLONGE.
What it is. (INDORSEMENT, § 12.)
ALTERATION.
Is a real defense. (DEFENSES, § 3 (*c*).)
Is a bar to action by purchaser for value without notice. (PURCHASE FOR VALUE, § 6.)
Extinguishes a bill. (EXTINGUISHMENT, § 4.)
Extinguishes debt for which bill was given. (SPECIALTY, § 13.)
When material and when immaterial. (I. 447, n. 1.)
By a stranger. (I. 449.)
Innocent. (I. 449.)
ALTERNATIVE.
Note payable by A or B in the. (FORMAL REQUISITES, § 6.)
Note payable to A or B in the. (FORMAL REQUISITES, § 33.)
AMBIGUOUS INSTRUMENTS. (FORMAL REQUISITES, § 38.)
AMOUNT.
Must be certain. (FORMAL REQUISITES, §§ 18–20.)
Payable by acceptor and maker. (ACCEPTOR AND MAKER, § 16.)
Payable by drawer and indorser. (DRAWER AND INDORSER, § 8.)
Recoverable by pledgee of accommodation paper. (DEFENSES, § 5; I. 324, n.; I. 780, n. 1; II. 20, n. 1.)
Recoverable by pledgee upon paper improperly pledged. (PURCHASE FOR VALUE, § 9.)
Recoverable by accommodation payee. (See ACCOMMODATION PAPER.)
ANOMALOUS INDORSEMENT. (See IRREGULAR INDORSEMENT.)
ANTECEDENT DEBT.
Bill transferred in payment of, or as collateral security for. (PURCHASE FOR VALUE, §§ 8, 9; SPECIALTY, §§ 6–13.)
ANTEDATING.
A bill may be antedated. (I. 145.)
APPRAISEMENT LAWS.
Waiver of, does not affect negotiability. (FORMAL REQUISITES, § 17.)
ASSETS. (See EXECUTOR.)
ASSIGNEE. (See BANKRUPT.)
ASSIGNMENT.
Is not an indorsement. (I. 221, n. 2.)
Delivery without indorsement is an. (TRANSFER, §§ 7–9.)
Indorsement of non-negotiable paper is an. (II. 100, n. 1.)
Check is not an. (CHECKS, § 3.)
ASSUMPSIT. (See SPECIALTY, § 4.)

ATTACHMENT.
Bill when subject to. (CHATTELS, § 7.)
ATTORNEY'S FEES.
Promise to pay, does not affect negotiability. (FORMAL REQUISITES, §§ 15, 16, 19.)
AUTHORITY.
Not an order. (FORMAL REQUISITES, § 2.)

B.

BANK. (See BANK NOTES, BRANCH BANKS, CHECKS.)
Obligation of, to pay a customer's checks (CHECKS, §§ 3, 4) — or acceptances or notes payable on the bank. (CHECKS, § 12.)
Whether bills deposited for collection in a, pass on its bankruptcy to its assignee. (Giles *v.* Perkins, 9 East, 12.)
Hour of presentment of paper payable at a. (PRESENTMENT FOR PAYMENT, §§ 8, 9.)
Obligation of, to pay an acceptance or note payable at the bank. (CHECKS, § 12.)
BANK NOTES.
Paper payable in, not negotiable unless they are legal tender. (FORMAL REQUISITES, § 11.)
Must be presented for payment to charge maker. (ACCEPTOR AND MAKER, § 12.)
Of insolvent bank, how far payment. (SPECIALTY, § 9.)
If counterfeit, how far payment. (SPECIALTY, § 7.)
When to be presented or circulated to charge transferror. (PRESENTMENT FOR PAYMENT, § 5.)
Payable only on presentment. (II. 61, 62, n. 2.)
Never overdue, and therefore never barred by statute of limitations. (I. 783, n. 2.)
May be taken in execution. (CHATTELS, § 7.)
Transmission of, by halves. (PRESENTMENT FOR PAYMENT, § 6.)
Effect of loss of one half of. (II. 64, 65, n. 10.)
BANKRUPTCY.
Paper held by a bankrupt passes to his assignee, and is transferable only by him (TRANSFER, §§ 13, 16; PURCHASE FOR VALUE, §§ 1, 2 (*c*)) — unless held by the bankrupt as trustee, or made for his accommodation. (TRANSFER, §§ 7, 13, 16.)
No excuse for non-presentment. (DILIGENCE DISPENSED WITH, WHEN, § 16.)
Notice of dishonor to be given to whom in case of. (NOTICE OF DISHONOR, § 34.)
Proof in. (I. 324, n., to last paragraph of which add *Ex parte* Newton, 16 Ch. D. 330; *Ex parte* Talcott, I. 776, 780, n. 1; Appendix, II. 785.)
Bill given by discharged bankrupt for a barred debt is binding. (SPECIALTY, § 15, *c*.)
BEARER.
Paper payable to, is negotiable. (TRANSFER, §§ 1, 2.)
Paper payable to, passes by delivery (TRANSFER, § 10) — but may be indorsed. (Bank of England *v.* Newman, II. 102, 103, n. 1.)

BEARER — *continued.*
Transfer of paper payable to, is not an assignment within U. S. Rev. St., § 629. (Codman *v.* Vermont Co., 17 Blatch. 1.)
BILLS OF EXCHANGE. (See FORMAL REQUISITES.)
BILLS OF LADING. (II. 783.)
BLANK, BILLS SIGNED IN.
Bills blank as to payee, like bills indorsed in blank (INDORSEMENT, § 5), are negotiable by delivery, any holder having the right to fill the blank. (Cruchley *v.* Clarance, I. 128.)
Bills blank as to drawer governed by the same rule. (Harvey *v.* Cane, I. 881, 883, n. 1; Drummond *v.* Drummond, I. 883.)
Indorsement of blank form is evidence of unrestricted authority of its possessor to deal with it as he pleases. (Russell *v.* Langstaffe, I. 884.)
Take effect by relation as of the time of signing. (ACCEPTANCE, § 9; Barker *v.* Sterne, I. 527.)
Liability of parties signing in blank. (PURCHASE FOR VALUE, §§ 8 (*d*), 13 (*f*).)
Power of partner to give a blank acceptance of his firm. (Hogarth *v.* Latham, I. 548; PURCHASE FOR VALUE, § 13 (*f*).)
BLANK, INDORSEMENT IN.
What it is. (INDORSEMENT, § 5.)
Makes a bill negotiable by delivery as against all prior parties (TRANSFER, § 10; PURCHASE FOR VALUE, § 1) — but of course not as against a subsequent special indorser.
Holder may strike out any or all indorsements subsequent to an. (Smith *v.* Clarke, I. 315.)
A holder by filling up, to himself does not discharge intermediate indorsers. (Bank *v.* Ellis, 2 Fed. Rep. 44; Cole *v.* Cushing, 8 Pick. 48.)
How far to be controlled by collateral agreements. (COLLATERAL AGREEMENTS, § 7.)
Need not be filled up before being offered in evidence. (INDORSEMENT, § 5.)
BONA FIDE HOLDER. (See PURCHASE FOR VALUE.)
BONA NOTABILIA. (See CHATTELS, § 5.)
BONDS. (See NEGOTIABLE PAPER OTHER THAN BILLS AND NOTES.)
BRANCH BANK.
How far distinct from central bank. (NOTICE OF DISHONOR, § 18; II. 723, n. 1.)

C.

CANCELLATION.
Is a real defense. (DEFENSES, § 3 (*c*).)
Is a bar to action by purchaser for value without notice. (PURCHASER FOR VALUE, § 6.)
Extinguishes a bill. (EXTINGUISHMENT, § 3.)
What amounts to. (EXTINGUISHMENT, § 3).
Of acceptance permitted before delivery. (ACCEPTANCE, § 16.)
CASE.
Appropriate action upon a bill. (SPECIALTY, § 4.)

CERTAINTY.
In bills and notes. (FORMAL REQUISITES, §§ 18–33.)

CERTIFICATE OF DEPOSIT.
Is a promissory note. (FORMAL REQUISITES, § 4.)
Certified check is a. (CHECKS, § 6.)
No action upon, before presentment. (ACCEPTOR AND MAKER, § 12.)
Not barred by statute of limitations. (CHECKS, § 8.)
Not overdue till after presentment. (OVERDUE PAPER, § 9.)

CERTIFICATION OF NOTES AND ACCEPTANCES PAYABLE AT A BANK. (See CHECKS, § 12.)

CERTIFIED CHECKS. (CHECKS, §§ 6–11.)

CHATTELS.
A BILL IS A CHATTEL.
1. The interest in a simple contract, whether oral or written, is purely incorporeal. The written document which contains the obligation may, it is true, be regarded *strictissimi juris* as a chattel. But it is a chattel of a merely nominal value, its ownership and possession not being essential either to the enforcement of the obligation or, where *choses in action* are transferable, to its transfer.
A specialty contract differs widely in this respect from a simple contract. A bill or note, for example, regarded as a document, has a substantial value, it being impossible either to compel payment of the obligation or to transfer one's interest therein at law, except by a surrender or transfer of the instrument itself to the payer or purchaser respectively. In other words, the holder's right *in personam* is dependent upon his having a right *in rem*.
It is not surprising, therefore, to find that the holder's interest in negotiable paper has been treated by the courts in many instances as if it were a chattel interest as distinguished from a *chose in action*. It is believed, indeed, that the law would have been simplified, and mercantile custom more fully respected, if this conception of a bill as a chattel had obtained even greater recognition than it has yet received; and this belief is confirmed by the legislation which has already taken place. As the law now stands, bills are treated as chattels, when simple written contracts are not so treated, in the following respects: —
Conversion of Bills.
2. Bills and notes are the subject of conversion, and the measure of damages is the collectible value of the obligation (Mercer *v.* Jones, II. 693), or, in the case of bank notes and negotiable bonds, their market value. (II. 693, n. 1.)
Larceny of Bills.
3 By statute in England (and in many of the States of this country), negotiable paper has been made the subject of larceny, but this legislation does not extend to simple contracts generally. (II. 693, n. 1.)
Gifts of Bills Mortis Causa.
4. A bill or note may be the subject of a *donatio mortis causa*, even though payable to order and unindorsed. (Rankin *v.* Weguelin, II. 699, 701, n. 1.)

CHATTELS — *continued.*

Bills are Bona Notabilia.

5. Where the instrument is, and not where the debtor is. Yeoman *v.* Bradshaw, II. 689, is *contra*, but this case, although followed in Slocum *v.* Sanford, 2 Conn. 533; Chapman *v.* Fish, 6 Hill, 554 (but see *contra*, McNamara *v.* McNamara, 62 Ga. 200), is inconsistent with the settled practice to change the venue in an action upon a bill or note (Holcroft *v.* Collwest, II. 690, 691, n. 1), and, it is submitted, cannot be law, for the reasons given in II. 689, n. 3. Furthermore, the case of Yeoman *v.* Bradshaw is inconsistent with the cases in which it has been decided that an administrator may transfer the title to negotiable paper, although he has not taken out letters of administration in the jurisdiction where the debtor upon a bill or note resides. (I. 389, n. 1.)

Bills are Goods and Chattels.

6. Bills and notes are held to be covered by the designation "goods and chattels" in the statute of frauds and other statutes. (Sheldon *v.* Parker, II. 706, 707, n. 3.)

Bills subject to Execution.

7. Bank notes may be attached or taken in execution like ordinary chattels (Handy *v.* Dobbin, II. 704, n. 2), and may be taken upon trustee or garnishee process. (II. 703.) The courts, however, making a distinction founded upon no legal principle, decided that a defendant's negotiable paper, other than bank notes, was, like ordinary *choses in action*, beyond the reach of legal process. But by statute in England, and some of the States of this country, all negotiable paper may now be taken in execution like chattels. (II. 705, n.)

Bills taxable where they are.

8. Property is of course taxable only in the jurisdiction where it is situated. There is considerable authority for the doctrine that a holder's property in a bill is taxable in the jurisdiction where the instrument is (II. 705), although there are some decisions that the *situs* of a holder's property in a bill is the residence of the creditor (II. 705, n. 2), and others that the *situs* follows the person of the debtor. (Bridges *v.* Mayor, II. 705 and n. 1.)

Transfer of Bills. — Conflict of Laws.

9. Although the authorities are not harmonious upon this point, it is nevertheless confidently submitted that the validity of a voluntary transfer of property *inter vivos* is governed by the law of the place where the property is situated at the time. If the transfer is valid by that law, it is valid everywhere; if invalid by that law, it is invalid everywhere (Green *v.* Van Buskirk, 7 Wall. 139);

and this doctrine applied to a bill as a chattel is the only one by which the rights and obligations of parties to bills and notes can be worked out according to their intentions. (See CONFLICT OF LAWS, §§ 9–11.)

CHECKS. (See OVERDUE PAPER, § 9.)

FORMAL REQUISITES.

1. A check differs in point of form from an ordinary bill of exchange only in two respects: first, it must be drawn on a bank; secondly, it must be payable on demand. (Woodruff *v.* Merchants' Bank, II. 295, 297, n. 2; Bowen *v.* Newell, II. 299, 300, n. 1.) The statement in Woodruff *v.*

CHECKS — *continued.*

Merchants' Bank, II. 296, that a check must be payable to bearer, is erroneous; for a check may be payable to order or to a particular person without words of negotiability. (II. 781, n. 1; Bowen *v.* Newell, II. 299.)

LIABILITY OF THE DRAWER.

2. No delay in the presentment of a check will discharge the drawer from his obligation, unless, and only so far as, he has been actually prejudiced by the delay, as by the failure of the bank with funds of his in its possession. (Serle *v.* Norton, II. 723, 724, n. 1; Robinson *v.* Hawksford, II. 725, 729, n. 3.) In other respects the liability of the drawer of a check is coextensive with that of the drawer of any other bill of exchange. (See DRAWER AND INDORSER.)

LIABILITY OF DRAWEE.

To the Holder.

3. A check being a bill of exchange, and not an assignment of a specific fund, confers no right of action upon the holder against the drawee. (Hopkinson *v.* Forster, II. 733, 735, n. 1; First Bank *v.* Whitman, II. 743, n. 1.)

To the Drawee.

4. By custom, a bank having funds of a customer is bound to him to honor his checks to the amount of those funds. (Marzetti *v.* Williams, II. 715, 723, n. 1.)

LIABILITY OF INDORSER.

5. The obligation of an indorser of a check, whether payable to order or to bearer, is the same as that of an indorser of any other bill of exchange. (Keene *v.* Beard, II. 730, 733, n. 1; see DRAWER AND INDORSER.)

CERTIFIED CHECKS.

6. A check is not presentable for acceptance. (II. 800.)

A certified check, it is true, has sometimes been spoken of as an accepted bill. A check, however, after certification, ceases to be a bill at all; it is transformed into a certificate of deposit, *i.e.*, a promissory note. The certification of a check is not, like the acceptance of a bill, an added obligation, but a substituted obligation. The legal effect of the certification of a check is the same as would be produced if the holder were to surrender the check to the bank and receive therefor the note or certificate of deposit of the bank, payable on demand. (Thomson *v.* Bank of Br. N. America, 82 N. Y. 1, 6.)

7. Accordingly the holder of a certified check has no recourse to the drawer upon the bank's failure to pay (First Bank *v.* Leach, II. 744, 747, n.; First Bank *v.* Whitman, II. 743, n. 1);

and the drawer, of course, has after certification no power to countermand the payment of the check. (First Bank *v.* Leach; *supra*, Willets *v.* Phœnix Bank, II. 738.)

Liability of Certifying Bank.

8. No laches is imputable to the holder for delaying presentment of a certified check, inasmuch as the certifying bank continues indefinitely liable thereupon, as upon a bank note. (Willets *v.* Phœnix Bank, II. 738, 739, n. 1.)

CHECKS — *continued.*

9. The transfer of a certified check, payable to bearer, by a thief, like the transfer of a bank note, will give a purchaser for value without notice a good title. (Nolan *v.* Bank of N. Y., 67 Barb. 24.)
10. Upon principle, it seems clear that a bank is liable upon a check which it has certified, although prior to the certification the amount was altered; and there is authority for this view. (La. Bank *v.* Citizens' Bank, I. 601; but see Marine Bank *v.* Nat. Bank, I. 587, 591, n. 1, *contra.*)

Form of Certificate.

11. A certified check being in effect a bank note, it is obvious that the certification must be in writing. The certification is commonly in the form of the word "good." A verbal promise by the bank upon which a check is drawn to pay it is neither a payment of the check, nor is it negotiable, nor even enforceable as a simple contract, unless it is based upon a common law consideration, and made in conformity with the provision of the statute of frauds relating to promises to pay the debt of another. (Morse *v.* Mass. Bank, II. 739; II. 743, n. *a.*)

The decision in Seventh Bank *v.* Cook, II. 742, that a bank which pays a check drawn upon it to a holder claiming under a forged indorsement, thereby in effect certifies the check in favor of the true owner, is opposed alike to reason and authority. (First Bank *v.* Whitman, II. 743, n. 1.)

ACCEPTANCES AND NOTES PAYABLE AT A BANK.

12. One who accepts a bill or makes a note payable at a bank occupies in many respects a position like that of the drawer of a check. Thus,

The bank having funds is bound to the acceptor or maker to pay the holder. (II. 723, n. 1.)

The acceptor and maker are chargeable by the same measure of diligence in presentment to the bank for payment. (II. 729, n. 3; Lazier *v.* Horan (Iowa, 1880), 23 Alb. L. J. 150; Bank *v.* Zorn (S. Ca. 1881), 12 Reporter, 155. But see Indig *v.* Nat. Bank, 80 N. Y. 100, 107, *semble;* Williamsport Co. *v.* Pinkerton (Pa. 1880), 22 Alb. L. J. 478, *contra.*)

Such acceptances and notes may be certified in the same manner and with the same effect as checks. (II. 739, n. 1. But see II. 747, n. 1.)

They differ from checks in this, — that the acceptor or maker is not entitled to notice of non-payment by the bank. (Pearse *v.* Pemberthy, II. 12.)

13. CROSSED CHECKS. (See II. 747, n.)

COLLATERAL AGREEMENT. (See PURCHASER FOR VALUE, § 4; OVERDUE PAPER, § 4.)

IN THE SAME INSTRUMENT WITH A BILL.

1. An agreement in the same instrument with a bill is incorporated with it (Wait *v.* Pomeroy, I. 576, 577, 578, n. 5), and if not also negotiable commonly destroys the negotiability of the bill. For instances in which the negotiability was considered not to be impaired, see FORMAL REQUISITES, §§ 14–17.)

EXTRANEOUS AGREEMENTS.

2. Contemporaneous agreements which do not appear in the same instrument with the bill cannot be incorporated with it, for upon principle no extrinsic evidence, and by the decisions no oral evidence, is admissible to modify a contract in writing, *a fortiori* a mercantile specialty. (II. 59, 30, n. 2; II. 129, 130, n. 1.)

COLLATERAL AGREEMENT — *continued.*

3. Nevertheless a practical distinction exists between two classes of extrinsic agreements, one of which has no effect upon the obligation of a party to a bill, whereas the other substantially annihilates the obligation. The former class includes agreements which would vary the obligation of the party to the bill; the latter class includes agreements whose effect is to relieve him of all liability upon the bill.

4. Accordingly in an action upon a bill no effect is given to

a contemporaneous agreement that a bill or note shall be extended or renewed (Hoare *v.* Graham, II. 124);

or an agreement that presentment and notice shall not be required (Free *v.* Hawkins, II. 132);

or an agreement that a party signing shall not be liable as indorser, but only as a guarantor of the identity of another party. (Prescott *v.* Caverly, II. 231.)

5. On the other hand, the defendant is relieved of all liability in the following instances, in accordance with the expressed or implied agreement of the parties: —

where the defendant signs a bill or note for the accommodation of the plaintiff or subsequent party (Thompson *v.* Clubley, II. 58, 59, n. 2; Castrique *v.* Buttigieg, II. 161, n. 1);

where the defendant indorses a bill to the plaintiff for collection (Denton *v.* Peters, II. 182);

where the defendant, as agent, indorses a bill with the simple object of remitting it to his principal, the plaintiff (Castrique *v.* Buttigieg, II. 156, 168, n. 1, explaining Goupy *v.* Harden, II. 130);

where the defendant, as agent, draws a bill in favor of his principal, the plaintiff, upon the purchaser, as the simplest mode of enabling his principal to collect the amount due on the sale (Roberts *v.* Austin, II. 216, 218, n. 2; Hicks *v.* Hinds, II. 221, 224, n. 2; the case of LeFevre *v.* Lloyd, II. 129, if not distinguishable in its facts, must be regarded as overruled by Castrique *v.* Buttigieg, II. 156);

where the defendant draws or indorses a bill upon a mutual understanding that the plaintiff shall have no recourse to him (Pike *v.* Street, II. 135, n. 1, 2; McCulloch *v.* Hoffman, II. 257; see also Babcock *v.* Beman, II. 224, 226, n. 3);

where the defendant is ostensibly the indorser and the plaintiff indorsee, but in reality both are co-sureties for a third person (Ross *v.* Espy, II. 243, 245, n. 7);

where the defendant gives his note to the plaintiff merely as a receipt of payment (Norman *v.* Norman, II. 98, 99, n. 2);

where the defendant gives his note to the plaintiff as an escrow, and the condition has not been performed. (Bell *v.* Ingestre, I., 287, II. 99, n. 4.)

6. To reconcile the cases referred to in the preceding section with the rule excluding parol evidence, it has been asserted on the one hand that the defendants in those cases really made no contract whatever, and the rule in question does not exclude evidence of the non-existence of an alleged contract, but only evidence which would vary the forms of an existing contract; while on the other hand it has been maintained that the defendant's ground of defense was the absence of consideration for his promise.

COLLATERAL AGREEMENT—*continued.*

It is submitted that neither of these views will explain all the cases cited in the preceding section. In reply to the first view it would seem sufficient to point out that the defendant must have understood in nearly all the cases mentioned that his signature to the bill rendered him liable to subsequent holders, and this could only be through the transfer by the plaintiff of the defendant's contract with him, the defendant's willingness to sign being of course explicable by his confidence that the plaintiff would save him harmless. Furthermore, if the defendant made no contract with the plaintiff he would manifestly plead negatively, whereas in fact his plea is regularly in confession and avoidance. (Thompson *v.* Clubley, II. 58; Roberts *v.* Austin, II. 216; McCulloch *v.* Hoffman, II. 257; Norman *v.* Norman, II. 98.)

The answer to the view that absence of consideration was the true defense is, first, that the doctrine that absence of consideration is a defense to an action upon a bill is confined to a few exceptional cases (see SPECIALTY, §§ 14–17); and, secondly, that even if it were an universal rule it would not apply to several of the cases in hand, for in many of them the defendant received in fact a consideration from the plaintiff for his signature.

The avoidance of circuity of action, it is conceived, is the only principle upon which most of those cases can be supported. Whatever the plaintiff might recover upon the bill he would have to refund upon an expressed or implied agreement to save the defendant harmless. (Thompson *v.* Clubley, II. 58, 59, 60, n. 2; the editor's note, II. 129, 130, n. 2, should be corrected in the light of this section.)

Indorsement in Blank.

7. The rule that excludes parol evidence of terms which would modify a written contract presupposes a complete contract. A blank indorsement, however, is not a complete contract (INDORSEMENT, § 5), but presumptive evidence of an authority to make a complete contract by way of special indorsement. Accordingly, evidence seems properly admissible to rebut this presumption by showing the actual authority. Therefore the decisions in the cases referred to, *supra*, § 4, would vary accordingly as the indorsement was special or in blank, and such is the law in many jurisdictions. But there is great contrariety in the authorities. (II. 124, n. 1; II. 133, n. 1.)

COLLATERAL SECURITY.

Holder for, takes title to the bill. (I. 324, n.)

When holder for, is holder for value. (PURCHASE FOR VALUE, § 8.)

When holder for, can recover, or prove in bankruptcy for, the face of the bill. (I. 324, n.; PURCHASE FOR VALUE, § 9.)

Holder for, may charge an accommodating party. (SPECIALTY, § 15, *b.*)

Bill taken as, for a debt does not extinguish the debt (Pring *v.* Clarkson, 1 B. & C. 14), unless the holder is guilty of laches. (SPECIALTY, § 8)

Right of holder for, to sell negotiable paper. (II. 781, n.)

Payment of a bill to the pledgee extinguishes it when. (EXTINGUISHMENT, § 15.)

COLLECTION, AGENCY FOR.

1. A depositor for collection may maintain trover for uncollected bills against

COLLECTION, AGENCY FOR — *continued.*

a bankrupt collecting bank. (Giles *v.* Perkins, 9 East, 12; Thompson *v.* Giles, 2 B. & C. 422); or against a bank to which the bankrupt bank has transmitted them for collection, the latter bank having notice of the original agency for collection. (Sweeny *v.* Easter, 1 Wall. 166.)

2 A depositor for collection may maintain assumpsit for money had and received against the collecting bank for bills collected and placed to its credit by its correspondent, although the latter becomes bankrupt, indebted to the defendant. (Mackersey *v.* Ramsays, 9 Cl. & F. 818; Hoover *v.* Wise, 91 U. S. 308, *semble.*)

Consistently with these decisions, it would seem that a depositor for collection could not maintain assumpsit for money had and received against a correspondent bank for bills collected by that bank, and placed to the credit of the bank which received the bills from the depositor, the latter bank having become bankrupt, and being indebted to the correspondent bank. (Hyde *v.* First Nat. Bank, 7 Biss. 151. But see *contra*, First Nat. Bank *v.* Reno Bank, 3 Fed. Rep. 257; Blaine *v.* Bourne, 11 R. I. 119.)

3. If bills deposited for collection do not disclose the agency on their face, and are afterwards transmitted to another bank, the latter bank may, as a purchaser for value, hold them as against the original depositor to the extent of any indebtedness to it from the transmitting bank. (Mackersy *v.* Ramsays, 9 Cl. & F. 810, 849, *semble;* Bank of Metropolis *v.* New England Bank, 6 How. 227.) But of course this rule is otherwise in New York. (McBride *v.* Farmers' Bank, 26 N. Y. 454; Dickerson *v.* Watson, 47 N. Y. 439.)

4. Bills deposited for collection do not pass to the assignee of the bank upon its bankruptcy. (Giles *v.* Perkins, 9 East, 12.)

5. A holder for collection is entitled to his day for giving notice of dishonor, like a regular indorsee. (NOTICE OF DISHONOR, § 18.)

6. An indorsee for collection can of course maintain no action against his indorser. (Denton *v.* Peters, II. 182.)

COMMON COUNTS. (See SPECIALTY, § 5.)

COMPUTATION.

Of days of grace. (See PRESENTMENT FOR PAYMENT, § 4.)

Of months. (See PRESENTMENT FOR PAYMENT, § 4.)

CONDITION.

Bill must not be payable upon. (FORMAL REQUISITES, §§ 6–10.)

CONDITIONAL INDORSEMENT. (See INDORSEMENT, § 9; PURCHASE FOR VALUE, § 13 (*b*).)

CONFLICT OF LAWS.

VALIDITY OF A BILL.

1. The validity of a bill, note, acceptance, or indorsement depends, like that of any contract, upon the *lex loci contractus.* (II. 255, n. 1; Bennison *v.* Jewison, I. 512.)

NATURE OF THE OBLIGATION.

2. The nature of an obligation, *e. g.*, whether it is a negotiable instrument or a simple contract, either assignable or unassignable, is determined by the *lex loci contractus.* (De la Chaumette *v.* Bank of England, I. 354;

CONFLICT OF LAWS — *continued.*

Ory *v.* Winter, II. 84; Woods *v.* Ridley, II. 90; Robertson *v.* Burdekin, Court of Session, 6 D. 17; 1 Ross, L. C. 812, s. c.; Stix *v.* Mathews, 63 Mo. 371.)

RATE OF INTEREST.

3 The rate of interest payable *ex mora* is governed by the *lex loci solutionis*, *i. e.*, the rate payable by an acceptor or maker is the rate which prevails where the bill or note is payable (II. 256, n. 1); while the rate payable by a drawer or indorser is the rate which prevails at the place where the drawer or indorser is bound to fulfil his contract of indemnity. (Gibbs *v.* Fremont, II. 151; *Ex parte* Heidelback, II. 245. But see Peck *v.* Mayo, II. 218, *contra.*)

Interest payable by a drawer or indorser *ex mora* should be carefully distinguished from interest payable by a drawer or indorser in fulfilment of his contract to indemnify the holder against the dishonor of the bill or note by the acceptor or maker. (See DRAWER AND INDORSER, § 11.)

DAMAGES IN LIEU OF RE-EXCHANGE.

4. Damages payable as a substitute for re-exchange are determined by the *lex loci solutionis*. (Slacum *v.* Pomery, II. 199; Lennig *v.* Ralston, I. 564.)

TIME OF PAYMENT.

5. Whether any, and how many, days of grace shall be allowed, depends upon the law of the place where the bill or note i payable by the acceptor or maker. (Bowen *v.* Newell, II. 227.)

Similarly, the postponement of the day of payment by the sovereign power of the place where the bill is payable will be respected everywhere, although it will necessarily affect the contract of the drawer or indorser. (Rouquette *v.* Overmann, II. 185.)

PRESENTMENT, PROTEST, AND NOTICE.

6. The formalities of diligence are regulated by the law of the place where they are to be performed, *i. e.*, by the law of the place where the bill or note is payable by the acceptor or maker, *e. g.*,

Time of notice. (Rothschild *v.* Currie, II. 137; Hirschfeld *v.* Smith, II. 178; Rouquette *v.* Overmann, II. 185, *semble;* Horne *v.* Rouquette, 3 Q. B. D. 514, cited II. 211, n. 1.)

Protests. (II. 210, n. 1.)

Presentment. (II. 211, n. 1.)

7. If presentment, protest, or notice, or some other distinct act of diligence, is required by the law of the place where the bill or note is payable by the acceptor or maker, but is not required by the law of the place where the contract of the drawer or indorser is to be performed, the law of the latter place, according to the decisions in this country, controls. (Aymar *v.* Sheldon, II. 206, 211, n. 1; Lee *v.* Selleck, II. 237.) But in England the point has been left open. (II. 211, n. 1.)

PURCHASE FOR VALUE.

8. What constitutes one a purchaser for value is a question of commercial law, and not a question of jurisdiction. Accordingly, it will practically be governed by the *lex fori.* (Woodruff *v.* Hill, II. 97; Ives *v.* Farmers' Bank, 2 All. 236; but see Allen *v.* Bratton, 47 Miss. 119; Harrison *v.* Pike,

CONFLICT OF LAWS — *continued.*

48 Miss. 46; Bright *v.* Judson, 47 Barb. 29; King *v.* Doolittle, 1 Head, 77; Keyes *v.* Wood, 21 Vt. 331.)

TRANSFER.

9. There is the utmost diversity of opinion as to the effect of a transfer upon the liability of parties to negotiable paper where the transfer is in a different jurisdiction from that in which the paper was executed or made payable, *e.g.*, —

In Trimbey *v.* Vignier, I. 358, the French law was deemed decisive of the liability of the maker to the transferee in the case of a note made and indorsed in France, but whether because the note was made, or because the transfer took place in France, does not clearly appear.

In Lebel *v.* Tucker, I. 364, the English law was decided to govern the liability of the acceptor to the transferee in the case of a bill drawn and accepted in England, but indorsed in France, because the acceptance was in England.

In Bradlaugh *v.* De Rin, I. 371, the Court of Common Pleas decided that the French law governed the acceptor's liability to the transferee in the case of a bill drawn in France, accepted in England and indorsed in France, the fact that the bill was drawn in France being thought sufficient to distinguish this case from Lebel *v.* Tucker, *supra.*

In Everett *v.* Vendryes, 19 N. Y. 436, the law of New York was allowed to control the liability of the drawer to the transferee in the case of a bill drawn and indorsed in New Granada but payable by the drawee in New York, because the bill was payable there.

10. The English cases above mentioned possess no longer the weight of positive decisions, since it was afterwards discovered by the Court of Exchequer Chamber, in Bradlaugh *v.* De Rin, I. 377, that the judges had proceeded upon a misconception of the French law, there being in fact no conflict between the laws of the two jurisdictions as to the transfer of the title. The same misconception existed in the New York case.

But independently of this error of fact as to the state of the foreign law, the reasoning of the courts in those cases is extremely unsatisfactory. In the first place, not only is the doctrine of Lebel *v.* Tucker, that the validity of a transfer with reference to the liability of antecedent parties depends upon the *lex loci contractus* of each party, wholly inconsistent with the view in Everett *v.* Vendryes, that the *lex loci solutionis* of the bill is the controlling law, but in both cases the courts proceeded upon the theory that the question before them was a question of contract, whereas in truth it was a question of property. The defendants in those cases were in the position of stakeholders. Their obligation was the same whether the transfer was valid or invalid. The only point in controversy was which of two parties had the right, as owner of the bill, to compel the performance of that obligation.

Secondly, it is generally agreed that the validity of an indorsement regarded as a contract is regulated by the law of the place where the indorsement is made; accordingly, if either of the two views under discussion is to be adopted, it must follow that an indorsement might be valid as a contract and yet give the indorsee no title to the bill, and, as a further consequence, the prior parties would be practically discharged from liability, for the indorsee having, *ex hypothesi*, no title, could not sue them,

CONFLICT OF LAWS — *continued.*

and the indorser not having the bill, or any right to recover it from his indorsee, could maintain no action upon it.

Thirdly, if the view of the court in Lebel *v.* Tucker is correct, an indorsement might give the indorsee a right against some of the antecedent parties, but not against others, and as in the preceding case supposed, and for the same reasons, the latter parties would be practically discharged from all liability upon the bill. It is difficult to believe that doctrines which involve consequences so palpably unjust and so utterly foreign to the mercantile conception of a bill as an entirety, can finally prevail. Indeed, the Court of Common Pleas, in Bradlaugh *v.* De Rin, I. 371, although professing to distinguish the case before them from Lebel *v.* Tucker, expressly repudiated the notion that an indorsement might be a valid transfer as to one of the antecedent parties and invalid as to another.

11. Upon principle, it is submitted, the transfer of a bill is governed by the law of the place where it is at the time of transfer. If a bill can be regarded as a chattel (see CHATTELS), this law governs as a matter of right upon general principles of jurisdiction. (Green *v.* Van Buskirk, 7 Wall. 139.) If a bill must be considered simply as made up of as many *choses in action* as there are parties liable upon it, the liability of those parties to a transferee would depend, it is true, as a matter of jurisdiction, upon the law of the place where each party happened to be at the time of the transfer. But the courts of the debtor's country, unless prohibited by the settled policy or declared will of their sovereign, would presumably adopt as their law, upon principles of comity, the law of the place where the bill was at the time of transfer as the only law which would give full effect to the mercantile idea that a bill is negotiable as an entirety, and avoid the startling consequences which have been pointed out as corollaries from the doctrines advanced in the English and New York cases. And the courts of other countries in deciding according to the same law would fully respect the law of the country having jurisdiction over the subject-matter of the transfer. See also the opinion of the French writers Demangeat and Nougier, II. 179; I. 373, n. 1.

12. If an instrument is negotiable by the *lex loci contractus*, and is transferred in accordance with the law of the place of transfer, the transferee will get a good title, although the bill would not be negotiable according to the law of the place of transfer. (Robertson *v.* Burdekin, Court of Sessions, 6 D. 17; 1 Ross, L. C. 812, s. c.; Stuart *v.* Greenleaf, 3 Day, 311. The case of Roosa *v.* Crist, 17 Ill. 450, is clearly erroneous.)

13. If an instrument is not negotiable by the *lex loci contractus*, its transfer wherever made will be no more than an assignment of a *chose in action*, and whether the assignee should bring an action upon the instrument in his own name or in that of the assignor will depend upon the *lex fori*. The case of Lodge *v.* Phelps, I. 382, *contra*, cannot be supported upon principle.

14. If by the law of the place of transfer the legal title does not pass, but only the beneficial interest, the question whether the transferee should bring an action in his own name or in the name of his transferror must be decided according to the *lex fori*. (Foss *v.* Nutting, I. 383. The editor's notes to this case, p. 385, should be stricken out.)

CONFLICT OF LAWS — *continued.*

PAYMENT BY A BILL.

15. Whether a bill operates presumptively as a conditional or absolute payment of a debt, has been thought to depend upon the law of the place where the bill was given to the creditor. (Vancleef *v.* Therasson, II. 630, 631, n. 5.)

CONSIDERATION.

How far necessary in a bill or note. (SPECIALTY, §§ 14, 15.)

Failure of, is a personal defense, and therefore inoperative against a purchaser for value without notice (DEFENSES, § 5; PURCHASER FOR VALUE, § 4) — but bars an action by a transferee after maturity. (OVERDUE PAPER, § 4.)

CONTEMPORANEOUS AGREEMENT. (See COLLATERAL AGREEMENT.)

CONTINGENCY. (See CONDITION.)

CONTRACT.

Simple, a bill is not a. (SPECIALTY.)

CONTRIBUTION.

Between successive indorsers. (SPECIALTY, § 15 (*h*).)

CONVERSION.

Of a bill, trover lies for. (CHATTELS, § 2.)

COPY.

Of protest need not accompany notice of dishonor. (NOTICE OF DISHONOR, § 6.)

Presentment upon a, in case of lost note. (PRESENTMENT FOR PAYMENT, § 23.)

CORPORATION.

Power of, to sign negotiable paper. (II. 752, n. 1.)

COSTS.

Liability of acceptor or maker for indorser's. (ACCEPTOR AND MAKER, § 16.)

Accommodating party cannot recover costs of unsuccessful defence from party accommodated. (II. 84, n. 1.)

COUPONS. (See NEGOTIABLE PAPER.)

COVENANT NOT TO SUE. (See SURETY.)

COVERTURE.

Is a real defense (DEFENSES, § 8 (*a*)), and therefore bars an action by a purchaser for value without notice. (PURCHASE FOR VALUE, § 6.)

Of prior party is no defense to a subsequent indorser. (DRAWER AND INDORSER, § 1.)

Paper payable to a married woman, or held by a *feme sole* at the time of her marriage, vests in her husband (TRANSFER, § 13), and is transferable only by him, or by her as his agent (TRANSFER, § 17), and he alone is the proper party plaintiff in an action thereon. (McNeilage *v.* Holloway, II. 694, 697, 698, n. 1.)

COVERTURE — *continued.*
Extinguishes a bill made by a husband, and held by the wife at the time of the marriage, or indorsed to her after marriage (EXTINGUISHMENT, § 7);
or a bill executed by a *feme sole*, and held by her husband at the time of the marriage, or indorsed to him after marriage. (EXTINGUISHMENT, § 7.)

CROSS BILL.
Is the basis of re-exchange. (DRAWER AND INDORSER, § 12.)

CROSS BILLS AND ACCEPTANCES.
No relation of principal and surety in case of specific exchange of. (Rolfe *v.* Caslon, 2 H. Bl. 570; Cowley *v.* Dunlop, 7 T. R. 565; Buckley *v.* Buttivant, 3 East, 73.)
One party to a specific exchange of, cannot prove against the other party without taking up his own paper. (Sarratt *v.* Austin, 4 Taunt. 200; *Ex parte* Solarte, 2 D. & C. 261.)
When provable in case of mutual bankruptcy. (See Byles, Bills (13th ed.), 451–455, citing *Ex parte* Walker, 4 Ves. 373; *Ex parte* Earle, 5 Ves. 833; *Ex parte* Rawson, 1 Jacob, 274; *Ex parte* Read, 1 Gl. & J. 224.)

CROSSED CHECKS. (See II. 747, n.)

CURRENCY } Paper payable in, is not negotiable. (FORMAL
CURRENT FUNDS } REQUISITES, § 11.)

D.

DAMAGES.
What recoverable against acceptor. (ACCEPTOR, LIABILITY TO DRAWER § 1; ACCEPTOR AND MAKER, § 16.)
What recoverable against drawer and indorser. (DRAWER AND INDORSER, §§ 8–12.)
For conversion of bill. (CHATTELS, § 2.)

DATE.
Necessity of, in a bill. (I. 145.)
Day of, excluded in determining the time of payment. (PRESENTMENT FOR PAYMENT, § 4.)

DAY.
Of presentment. (PRESENTMENT FOR ACCEPTANCE, § 2; PRESENTMENT FOR PAYMENT, §§ 2–7.)
Of serving notice of dishonor. (NOTICE OF DISHONOR, §§ 7–18.)

DEATH.
Presentment to whom, in case of maker's or drawee's. (PRESENTMENT FOR ACCEPTANCE, § 8; PRESENTMENT FOR PAYMENT, § 20.)
Due presentment in case of holder's. (PRESENTMENT FOR PAYMENT, § 6.)
Due notice in case of drawer's or indorser's. (NOTICE OF DISHONOR, § 35.)
Note may take effect after maker's. (SPECIALTY, § 18.)
Bill, how transferable in case of holder's. (TRANSFER, §§ 14, 15.)
Of accommodation maker does not revoke payee's power to negotiate the note. (Clark *v.* Thayer, 105 Mass. 216. See Hatch *v.* Searles, I. 718.)

DEBT.
Upon a bill. (SPECIALTY, § 4.)
DECLARATION.
Material averments in. (DEFENSES, § 1.)
"DEFALCATION WITHOUT, OR DISCOUNT." (FORMAL REQUISITES, § 17.)
DEFENSES.

1. To show a *prima facie* cause of action upon a bill or note, a plaintiff must establish his title to the instrument, and the defendant's default. To make out his title he must allege and prove, first, the execution of the instrument by the defendant, and, secondly, its transfer to himself by the payee or subsequent holder, unless it was originally executed to him. To make out the defendant's default, he must allege and prove the presentment and protest of the instrument, and notice of its dishonor, wherever the obligation of the defendant is conditional upon the performance of one or more of these acts.

But although the plaintiff may be able to establish this *prima facie* cause of action, the defendant may, nevertheless, have a valid defense to it, *i. e.*, he may have it in his power, without disputing either the truth or legal effect of the facts which constitute the plaintiff's title, to adduce additional facts which render that title worthless.

Defenses, in the sense here described,[1] are of two kinds, real defenses and personal defenses.

REAL DEFENSES.

2. Real defenses, like real actions, are founded upon a right good against the world. They are called real because they attach to the *res*, *i. e.*, the instrument itself, regardless of the merits or demerits of the plaintiff. A purchaser for value without notice is therefore powerless against a real defense.

3. Real defenses are based upon

(*a*) *The incapacity of the defendant* to make a binding contract, *e. g.*:—

Infancy. (Williamson *v.* Watts, I. 463 and n. 1.)
Coverture. (Connor *v.* Martin, I. 395, n. 2; Barlow *v.* Bishop, I. 458.)
Insanity. (Sentance *v.* Poole, I. 492, 493, n. 1.)

[1] It is commonly stated that there are three modes of defensive pleading to an action at common law, namely, demurrers, negative pleas, or pleas by way of traverse, and affirmative pleas, or pleas by way of confession and avoidance. Demurrers and negative pleas, however, are not properly defenses, or at least not in the sense in which affirmative pleas are defenses. A demurrer is simply a mode by which the defendant obtains the judgment of the court upon the sufficiency in law of the plaintiff's pleading; a negative plea is but a mode of indicating to the plaintiff which one of his allegations he will be required to prove, it being a rule peculiar to the common law that all the allegations of an adversary's pleading which are not expressly denied are to be taken to be as true as if proved by evidence. Demurrers and negative pleas were alike unknown to the civil law. A demurrer was unnecessary, for under that system it was the plaintiff who invoked the opinion of the court as to the legal validity of his pleading by a motion that the pleading be allowed; and a negative plea could have had no *raison d'être*, inasmuch as the plaintiff was bound to prove all the allegations of his pleading except those which the defendant expressly admitted to be true. (Langdell, Summary of Equity Pleading, Introduction, §§ 6, 7.)

An affirmative plea, on the other hand, is strictly a defensive pleading. By such a pleading a defendant relies not upon the weakness of his adversary, but upon his own strength. Such a pleading must be common to all systems of procedure. It was known in the Roman law as the *exceptio*.

DEFENSES — *continued.*
Extreme intoxication. (I. 558, n. 1; but see Wilson *v.* Nisbet, I. 558.)
(*b*) *Illegality*, whereby by force of statute certain contracts are declared to be absolutely void, *e. g.*: —
Usury. (Lowe *v.* Waller, I. 413, 416, n. 2. But see Towne *v.* Rice, I. 591.)
Gaming. (Bowyer *v.* Bampton, I. 399, 400, n. 2.
For other instances see I. 416, n. 2; Bennison *v.* Jewison, I. 512.
(*c*) *The extinguishment* of the instrument by
Cancellation. Ingham *v.* Primrose, I. 530, is *contra*, but is overruled. (See Baxendale *v.* Bennett, I. 553, 556.)
Alteration. (Master *v.* Miller, I. 434, 447, n. 1; Hall *v.* Fuller, I. 482; Langton *v.* Lazarus, I. 495; Wait *v.* Pomeroy, I. 576, 578, n. 5; McGrath *v.* Clark, I. 584; Citizens' Bank *v.* Richmond, I. 607.)
Release by deed executed by the holder after maturity.

PERSONAL DEFENSES.

4. Personal defenses are founded upon the agreement or conduct of a particular person in regard to the instrument which renders it inequitable for him, though holding the legal title, to enforce it against the defendant. They are called personal defenses because they are available only against that person or a subsequent holder who stands in privity with him. Against a purchaser for value without notice they are inoperative. (See PURCHASE FOR VALUE.) The analogy at once suggests itself, and is believed to be a perfect one, in so far as they affect the title of such a purchaser, between personal defenses and equitable incumbrances. Indeed, some personal defenses, *e. g.*, the last four of those below mentioned, are strictly of an equitable nature, the judges, we must suppose, being led by their desire to make the procedure upon negotiable paper as summary as possible, unconsciously to transcend their jurisdiction in allowing these equities to be pleaded as common-law defenses. It may even be a question whether all personal defenses were not in their origin purely equitable. At all events, the defendant, in all cases, would have a concurrent right to proceed in equity by way of injunction against the maintenance of the action at law.

5. Personal defenses fall under some one of the following heads, viz.: —
Fraud. (I. 464, n. 1; Hayes *v.* Caulfield, I. 506.)
Duress. (Duncan *v.* Scott, I. 460, 461, n. 1.)
Failure of consideration. (I. 464, n. 1.)
Illegality either by common law or by statute, unless the statute renders the contract absolutely void. (See REAL DEFENSES, *supra*, § 3 (*b*); Potter *v.* Tubb, I. 464 and n. 1.)
Release by deed executed before maturity. (Dod *v.* Edwards, I. 486.)
Payment. (Burbridge *v.* Manners, I. 465, 466, n. 1.)
Accord and satisfaction. (Morley *v.* Culverwell, I. 497.)
Discharge of surety, *e. g.* (1) discharge of drawer or indorser, because the holder has released or agreed to give time to the acceptor, or maker, or prior indorser. (English *v.* Darley, II. 118, 119, n. 4, 5, 120, n. 2.) But if the defendant could have had no recourse against a prior party either because the prior party signed the instrument for his accommodation, or because he had released the prior party, the holder will not lose his rights against the defendant by discharging the prior party or giving him time.

DEFENSES — *continued.*

(Collott *v.* Haigh, II. 125 and n. 1.) (2) Discharge of accommodation acceptor, or maker, or indorser, because the holder has released or given time to the accommodated drawer, payee, or subsequent indorser. (Laxton *v.* Peat, II. 4, 5, n. 1; Ewin *v.* Lancaster, II. 78, 82, n. 2; Valley Bank *v.* Meyers, 17 N. B. R. 257. But see *contra*, Fentum *v.* Pocock, II. 12, 16, n. 1.)

Accommodation, *e. g.*, where a defendant has made a bill, note, or acceptance, or indorsed a bill or note to the plaintiff for the latter's accommodation. (Thompson *v.* Clubley, II. 58, 59, n. 2; Darnell *v.* Williams, II. 20.) This defense, however, is personal in the strictest sense, not being available against the transferee of the party accommodated, even though the transferee had notice of the accommodation, or gave no value. (Grocers' Bank *v.* Penfield, II. 685, 688, n. 1.) But to avoid circuity of action, a pledgee is permitted to recover only the amount for which the paper is pledged. (Nash *v.* Brown, II. 20; Jones *v.* Hibbert, II. 21; Wiffen *v.* Roberts, I. 117.)

DELIVERY.

Essential to a bill or note (FORMAL REQUISITES, § 35), or an indorsement (INDORSEMENT, § 16), or a transfer by act of the parties. (TRANSFER, § 12.)

Not essential to a transfer by operation of law, *e. g.*, by death, marriage, and bankruptcy. (TRANSFER, § 13.)

Whether essential to an acceptance. (ACCEPTANCE, § 16.)

When paper is transferable by mere, and when not. (TRANSFER, §§ 6–11.)

Effect of mere, when paper is transferable only by indorsement. (TRANSFER, §§ 7–9.)

By executor of bill indorsed by testator. (INDORSEMENT, § 17.)

May be by way of escrow (FORMAL REQUISITES, § 36; SPECIALTY, § 18), but it would seem not to the payee. (FORMAL REQUISITES, § 36.)

Must be to a party and not a stranger to the paper. (FORMAL REQUISITES, § 37.)

Liability of transferor by mere. (TRANSFEROR BY DELIVERY.)

Unauthorized. (PURCHASE FOR VALUE, § 1.)

When a party is estopped to deny a. (PURCHASE FOR VALUE, § 8 (*b*).)

DEMAND, BILLS OR NOTES PAYABLE ON.

When interest runs on. (ACCEPTOR AND MAKER, § 10.)

Acceptor and maker chargeable without a demand. (ACCEPTOR AND MAKER, § 12.)

When statute of limitations runs on. (ACCEPTOR AND MAKER, § 12.)

No grace on. (GRACE.)

When to be presented. (PRESENTMENT FOR PAYMENT, § 5.)

When overdue. (OVERDUE PAPER, § 9.)

DEMAND OF PAYMENT. (See PRESENTMENT FOR PAYMENT.)

DESTRUCTION. (See also LOST OR DESTROYED BILL.)

When an extinguishment of a bill. (EXTINGUISHMENT, §§ 1, 2.)

DILIGENCE DISPENSED WITH, WHEN.

WHERE THE DRAWER OR INDORSER IS, IN REALITY, NOT A SURETY, BUT A PRINCIPAL.

1. The usual conditions precedent to a right of action upon a bill or note, namely, presentment, notice of dishonor (and protest of foreign bills),

DILIGENCE DISPENSED WITH, WHEN — *continued.*

are dispensed with in the case of a drawer or indorser, whose duty it is, as between himself and the prior parties to the paper, to pay it at maturity.

Drawing without Provision for Payment by the Drawee.

2. A drawer who draws a bill without placing the drawee in funds to pay it, cannot ordinarily expect his bill to be honored, and is therefore not entitled to the performance of the usual conditions of presentment and notice of dishonor. (Bickerdike *v.* Bollman, II. 454, 459, n. 1; Hammond *v.* Dufrene, II. 463, *semble;* II. 466, n. 1; Cory *v.* Scott, II. 472, 474; Terry *v.* Parker, II. 476, 478, n. 2; Carew *v.* Duckworth, II. 498)

But the want or insufficiency of funds in the hands of the drawee will not excuse the omission of the usual diligence if the drawer, by reason of the relation between himself and the drawee, might fairly expect his bill to be dishonored. (Thackray *v.* Blackett, II. 464; Blackhan *v.* Doren, II. 462; Rucker *v.* Hiller, II. 465, 466, n. 1.)

Accommodation Paper.

3 An accommodating drawer or indorser is of course chargeable only by the exercise of the same diligence which would be necessary if the instrument were drawn or indorsed for value. (Cory *v.* Scott, II. 470, 474, n. 2; Turner *v.* Samson, II. 498.) But a drawer or indorser for whose accommodation an acceptance or note has been given, is not entitled to the usual diligence, for neither has any recourse to any other party. (II. 459, n. 1; II. 474, n. 2.)

Assumption of Primary Liability by Drawer or Indorser.

4. A drawer or indorser who has received assets from the acceptor or maker upon the understanding that, as between those parties, the drawer or indorser shall be exclusively liable to provide for the bill or note, is not entitled to the usual diligence. (Corney *v.* Da Costa, II. 459; Moses *v.* Ela, II. 515.) But in the absence of such an understanding between the parties, presentment and notice are necessary, even though the drawer or indorser may have received from the acceptor or maker either sufficient property to meet the bill or note, or their entire property. (Moses *v.* Ela, II. 515, 518, n. 2.)

Identity of Drawer and Drawee.

5. As one who draws a bill upon himself is in effect the maker of a note, notice of dishonor to him would be an absurdity (II. 462, n. 1); and by the misapplication to negotiable paper of the common law rule, that the debtor must seek the creditor, it is held that in such a case presentment also is unnecessary. (II. 462, n. 1.)

WAIVER OF PRESENTMENT AND NOTICE.

6. Presentment and notice, being conditions precedent, may of course be waived by a drawer or indorser, before the time for their performance, by apt words or conduct. (Phipson *v.* Kneller, II. 469, and n. 2.)

Cases of this kind should be carefully distinguished from those in which a drawer or indorser undertakes at the time of drawing or indorsing to dispense with presentment and notice. The legal effect of such an undertaking is not to waive the performance of conditions precedent, but to change the ordinary conditional contract of the drawer or indorser into an absolute contract. Accordingly, under the rule that a contract in writing cannot be varied by extrinsic evidence, this undertaking, to be

DILIGENCE DISPENSED WITH, WHEN — *continued.*

operative, must not be verbal (except in the case of blank indorsements), but must appear upon the face or back of the bill or note itself. (Free *v.* Hawkins, II. 132, 133, n. 1; COLLATERAL AGREEMENT, § 4.)

The cases of waiver before default should be distinguished also from those in which, after laches on the part of the holder in making due presentment or giving due notice, the drawer or indorser promises to pay as if due diligence had been used. A promise made under these circumstances cannot properly be called a waiver, but is a mere nude pact, and upon principle should have no legal effect whatever. There is also authority for this view (Donnelly *v.* Howie, II. 501), but it must be conceded to be settled law in England and this country that a drawer or indorser who, with knowledge of the holder's laches, promises to pay, may be charged as if the conditions of presentment and notice had been strictly performed. (II. 504, n. 1; Arnold *v.* Dresser, II. 359.) Nor will ignorance of the legal effect of the holder's laches lessen the effect of the promise. (II. 505, n. 1.)

TRANSFER OF A VOID BILL.

7. As one to whom a void bill or note, *e. g.*, a forged or altered bill, or a bill invalid under the stamp or usury laws, has been indorsed either for value or in payment of a debt, may repudiate the transaction, and sue at once, even before the maturity of the bill, either for the value paid or upon the original debt, it is evident that all questions of presentment or notice are out of the case. (Cundy *v.* Marriott, II. 474, 476, n. 1.)

It is only necessary for the indorsee to return the bill to his indorser within a reasonable time after the discovery of its invalidity. (Thomas *v.* Todd, II. 633, 634, n. 7.)

If, however, the indorsee chooses to keep the bill and to sue the indorser thereon, he must comply with the usual conditions of presentment and notice. (Leach *v.* Hewitt, II. 467, 469, n. 1.)

IMPRACTICABILITY OF MAKING PRESENTMENT.

Impossibility of finding Place of Presentment.

8. If a bill or note is payable generally, and after diligent inquiry neither the residence nor place of business of the drawee or maker can be found, presentment is excused. (Adams *v.* Leland, II. 513, 514, n. 2.) So also if the acceptor or maker has no domicile, and is at sea. (II. 513, n. 7.)

Removal of Drawee or Maker.

9. If after accepting a bill or making a note, the acceptor or maker has absconded, or removed into another jurisdiction, no presentment is required (M'Gruder *v.* Bank of Washington, II. 506, 507, n. 1; Dennie *v.* Walker, II. 512; Adams *v.* Leland, II. 514; Taylor *v.* Snyder, II. 340), although by some authorities it is held that presentment should be made in such cases at the last residence or place of business of the acceptor or maker. (II. 507, n. 1.)

But the mere absence of the acceptor or maker from the jurisdiction, his residence or place of business remaining unchanged, is no excuse for not making presentment. (Dennie *v.* Walker, II. 512.)

If a bill or note is payable at a particular place, the absence or removal of the drawee or maker has no effect upon the usual rules of diligence. (Sands *v.* Clarke, II. 488.)

DILIGENCE DISPENSED WITH, WHEN — *continued.*

Death of Drawee or Maker.

10. If at the time for presentment the drawee or maker is dead, presentment, as will be seen (*infra*, PRESENTMENT FOR PAYMENT, § 20), should be made to the personal representative of the deceased, if there is one, otherwise at his former residence. If, however, there is no representative, and the former residence is not occupied by the family of the deceased, presentment is dispensed with altogether. (II. 510, n. 1.)

So also if an administrator is by law not obliged to pay the debts of the deceased until the lapse of a certain time after his appointment, a bill or note falling due before the lapse of such time need not be presented at all. (II. 510, n. 1.)

Non-existence of the specified Place of Payment.

11. If a bill or note is payable at a particular place, and the place no longer exists at the maturity of the paper, presentment is, of course, not required. (Erwin *v.* Adams, II. 510, 511, n. 2.)

Legal Prohibition of Payment.

12. Where the drawee or maker is forbidden by law to pay a bill or note, its presentment is of course dispensed with. (II. 510, n. 1.)

In all the cases mentioned in the four preceding sections where presentment is dispensed with, notice of non-payment must nevertheless be given to the drawer and indorsers. (II. 510, n. 1.)

IMPRACTICABILITY OF SERVING NOTICE.

13. If, after diligent inquiry, neither the residence nor place of business of the party to be notified can be found, notice of dishonor may be dispensed with. (Williams *v.* Germaine, II. 42, 44; Berridge *v.* Fitzgerald, II. 396, 399; II. 408, n. 3; II. 484, n. 1.)

So also if the party serving notice goes at a reasonable hour to the dwelling house or place of business of the party to be charged, and finds no one there to receive the notice. (Allen *v.* Edmundson, II. 482, 484, n. 1.)

KNOWLEDGE EQUIVALENT TO NOTICE, WHEN.

14. If a bill is drawn by a firm upon one of its members, or a note is made payable to a firm by one of its members, and indorsed, and the bill or note is dishonored upon presentment, the usual notice of dishonor is dispensed with, the firm being affected with the knowledge of one of its members. (Porthouse *v.* Parker, II. 461, 462, n. 1.)

Presentment, however, is necessary in such cases. (II. 462, n. 1.)

15. Presentment to the executor of an acceptor or maker, the executor being also the drawer or indorser of the bill or note, is a sufficient notice of dishonor to the drawer or indorser. (Caunt *v.* Thompson, II. 485.)

But a presentment to the executor in his representative capacity is indispensable to charge him personally as drawer or indorser. (Magruder *v.* Bank of Georgetown, II. 508.)

CASES IN WHICH PRESENTMENT AND NOTICE ARE NOT EXCUSED.

16. Presentment and notice are not rendered unnecessary by

The fact that a drawer or indorser suffered no detriment. (Dennis *v.* Morrice, II. 460.)

Nor by a general declaration of the maker or acceptor that he will not pay his paper (Sands *v.* Clarke, II. 490, 491);

nor by the loss or destruction of a bill (Thackray *v.* Blackett, II. 465);

nor by the infancy of maker or acceptor (II. 469, n. 1);

DILIGENCE DISPENSED WITH, WHEN — *continued.*
nor by the insolvency or bankruptcy of the acceptor or maker. (Thackray *v.* Blackett, II. 464, and n. 1; Moses *v.* Ela, II. 517; Caunt *v.* Thompson, II. 486; Sands *v.* Clarke, II. 490; Smith *v.* Miller, II. 314.)
But where a note is transferred without indorsement, *e.g.*, a bank note, either for value or in payment of a debt, and the maker is insolvent at the time of transfer, the holder need not make presentment in order to sue either for the value paid, or for the original debt (Turner *v.* Stones, II. 478, 482, n. 1; Henderson *v.* Appleton, II. 594, 595, n. 1);
but he must give notice and tender back the note within a reasonable time after he becomes aware of the insolvency of the maker (Camidge *v.* Allenby, II. 587, 594, n. 2; Henderson *v.* Appleton, II. 594, 595, n. 1);
as to what is reasonable time, see II. 595, n. 1.

DIRECTION. (See ADDRESS.)

DISCHARGE OF SURETY. (See SURETY.)

DISCOUNT. (See DEFALCATION; USURY.)

DISHONOR. (See PRESENTMENT; PROTEST; NOTICE OF DISHONOR.)
Transfer of paper after its. (OVERDUE PAPER.)

DONATIO MORTIS CAUSA.
Unindorsed bill may be subject of. (CHATTELS, § 4.)
Maker cannot give his own note as a. (SPECIALTY, § 17.)

DRAWEE.
A bill must be addressed to a definite. (FORMAL REQUISITES, §§ 26–28.)
Not liable to holder on an unaccepted bill or uncertified check. (CHECKS, § 8.)
Bound to honor his customer's checks. (CHECKS, § 4.)
Bill blank as to, not a note. (FORMAL REQUISITES, §§ 4, 26.)

DRAWER.
Essential to bill. (FORMAL REQUISITES, § 25.)
Accepted bill blank as to, same as promissory note. (FORMAL REQUISITES, § 25.)
Bill addressed to, is a note. (FORMAL REQUISITES, § 28.)

DRAWER AND INDORSER, OBLIGATION OF. (See CHECKS, INDORSER WITHOUT RECOURSE.)
1. Every drawer promises the payee and subsequent holders, and every indorser promises his indorsee and subsequent holders, that if the drawee or maker fails to honor the bill or note, he will, upon the performance of certain conditions imposed by the law-merchant, indemnify the holder for all loss incurred by reason of the dishonor of the bill.
This contract of indemnity applies, of course, to the instrument according to its tenor at the time when it is signed by the drawer or indorser, and accordingly the liability of a drawer or indorser is not affected by a prior forgery or alteration, nor by the existence of any other defense in favor of prior parties. (MacGregor *v.* Rhodes, II. 169; Prescott Bank *v.* Caverly, II. 231, 233, n. 3.)
The nature and extent of the obligation of a drawer or indorser will most clearly appear by a separate consideration of the CONDITIONS, TIME, PLACE, and AMOUNT of the payment to be made by each.

DRAWER AND INDORSER, OBLIGATION OF — *continued.*

CONDITIONS OF PAYMENT.

Presentment to Drawee or Maker.

2. Presentment to the drawee or maker either for acceptance or payment being necessary to establish the dishonor of the instrument is, of course, a condition precedent to any liability by the drawer or indorser. (Lambert *v.* Oakes, II. 103, and n. 1; Heylyn *v.* Adamson, II. 109.)

A double presentment is in some cases necessary, for a sight bill, unlike other bills, must be presented for acceptance (Philpott *v.* Bryant, II. 133, 134, n. 1, 2);

and if accepted it must, of course, also be presented for payment; but if dishonored when presented for acceptance, no further presentment is required in England and this country (Milford *v.* Mayor, II. 121, n. 1; Ballingalls *v.* Gloster, II. 121, 123, n. 1; Whitehead *v.* Walker, II. 142; ACCEPTANCE, § 2), — unless the bill is afterward accepted *supra protest.* (Williams *v.* Germaine, II. 42, 2d case; Schofield *v.* Bayard, 3 Wend. 488.) But the continental law is otherwise. (Aymar *v.* Sheldon, II. 206, 207.)

Protest.

3. The obligation of a drawer or indorser is conditional upon a protest in the case of foreign bills. (Gale *v.* Walsh, II. 114.) Inland bills need not be protested (II. 114, n. 1); nor notes (II. 114, n. 1). For the requisites of due protest, see PROTEST.

Notice of Dishonor.

4. By the custom of merchants a drawer or indorser is entitled to due notice of dishonor before he can be called upon to take up the dishonored bill or note. (Dagglish *v.* Weatherby, II. 112, dishonor by non-acceptance; Blesard *v.* Hirst, II. 109, dishonor by non-payment.)

But of course an indorser cannot insist that notice should be given to the drawer. (Heylyn *v.* Adamson, II. 104; Rickford *v.* Ridge, II. 279, 280.)

Surrender of the Instrument to the Drawer or Indorser.

5. It seems clear that by the custom of merchants the obligation of a drawer or indorser resembles that of an acceptor or maker in so far that payment should be conditional upon the performance by the holder of the concurrent act of presentment and surrender of the instrument. (Beawes, Lex Mercatoria, 6th ed., 572, § 70.) Consistently with this principle it is held that a drawer or indorser cannot be charged at law if the bill or note is lost or destroyed. (Tuttle *v.* Standish, II. 234.)

Similarly, a tender of payment upon condition that the bill should be surrendered was held to be a good tender. (II. 237, n. 1; see also Walker *v.* Barnes, II. 126; Siggers *v.* Lewis, II. 136; see *infra*, §§ 6, 7.)

On the other hand, it must be conceded that the precedents of declarations contain no averment of presentment to the drawer or indorser. (2 Chitty, Pleading, 7th ed., 109 *et seq.*; see also *infra*, § 6.)

TIME OF PAYMENT.

6. If full effect were given to the custom of merchants the holder's cause of action would not be complete until the instrument had been presented for payment to the drawer or indorser. By positive decision, however, an action may be brought, in some jurisdictions, at least as soon as notice of dishonor is received by the drawer or indorser, and in others as soon as notice has been dispatched (Castrique *v.* Bernabo, II. 149, 150, n. 2);

DRAWER AND INDORSER, OBLIGATION OF — *continued.*
and the statute of limitations would doubtless be held to begin to run from the same times.

PLACE OF PAYMENT.

7. A drawer or indorser is bound to fulfil his contract of indemnity by payment at his place of business or residence, unless a particular place of payment is indicated in the bill or indorsement. Accordingly interest payable *ex mora* is computed according to the rate at the place of the drawer or indorser and not according to the rate at the place where the bill is payable by the acceptor or maker. (Gibbs *v.* Fremont, II. 151; *Ex parte* Heidelback, II. 245; but see Peck *v.* Mayo, II. 218, 220, n. 2, *contra.*)

AMOUNT OF PAYMENT.

8. The holder is of course entitled to receive at its maturity the amount specified in the bill or note. This amount, together with the necessary expenses arising from the dishonor of the instrument by the acceptor or maker, is the measure of the obligation of the drawer or indorser. These expenses are, when the drawer or indorser resides or does business at the place where the instrument is payable, the notarial fees and interest. If the place of the drawer or indorser is different from the place of payment of the instrument, re-exchange is to be added.

Amount specified in the Bill.

9. The liability of a drawer or indorser for the face or the bill or note seems too clear for argument. There are decisions, nevertheless, that an indorsee can never recover from his immediate indorser more than he paid for the bill, together with legal interest. (Cram *v.* Hendricks, II. 202, 205, n. 6.) These decisions have been severely and justly criticised. (II. 205, n. 6.)

Notarial Fees.

10. A drawer or indorser is bound to pay notarial fees. (Merritt *v.* Benton, II. 205.)

Interest.

11. The obligation of the drawer and indorser to pay interest is universally conceded; but there is much confusion in the authorities as to the mode of computing the interest. It was held, for example, in Gantt *v.* Mackenzie, II. 123, that interest runs from the moment the bill is dishonored by non-payment, while, on the other hand, it was decided in Walker *v.* Barnes, II. 126 (but see Siggers *v.* Lewis, II. 136), that interest would not run until the drawer or indorser was informed of the dishonor of the instrument.

Again, it is held in many jurisdictions that interest is to be computed according to the rate which prevails at the place of residence or business of the drawer or indorser (Gibbs *v.* Fremont, II. 151; *Ex parte* Heidelback, II. 245), while in others the rate of the place where the instrument is payable by the drawee or maker is treated as the basis of computation. (Rouquette *v.* Overmann, II. 193–195, *semble;* Peck *v.* Mayo, II. 218, 220, n. 2.)

This conflict of authority, it is conceived, has arisen from a failure to make a necessary distinction between interest payable by a drawer or indorser in fulfilment of his contract of indemnity, and interest payable by a drawer or indorser by way of damages for the non-fulfilment of his contract of indemnity. The first runs from the dishonor of the instrument to the

DRAWER AND INDORSER, OBLIGATION OF — *continued.*
time when it should, according to mercantile custom, be presented to the drawer or indorser, and ought to be computed at the rate prevailing at the place of dishonor. (See Suse *v.* Pompe, II. 173.) The second runs only from the presentment of the instrument to the drawer or indorser, and his failure to pay, and is to be computed according to the rate prevailing at the place where the contract of the drawer or indorser is to be performed.

Re Exchange.

12. When the place of payment by the drawer or indorser is different from that at which the instrument should have been honored by the drawee or maker, the amount of the drawer's or indorser's obligation is measured according to the principle of re-exchange. The holder is supposed to draw at the place of dishonor upon the drawer or indorser at the place of each, respectively, a cross-bill, payable at sight, for so much money as will enable him to negotiate the bill for an amount equal to what he should have received at the maturity of the original bill, together with notarial fees, interest, and the expenses incident to the negotiation of the cross-bill. If this cross-bill is honored upon presentment, the drawer or indorser fully discharges his contract of indemnity. If the cross-bill is not honored upon presentment, the holder may bring an action against the drawer or indorser upon the original bill, in which action he will be entitled to recover the amount of the cross-bill, and interest thereon, from the time of dishonor of the cross-bill, and at the rate of the place where the bill was payable. In England and the United States the cross-bill is not, as a rule, actually drawn, but simply serves as the measure of the drawer's or indorser's obligation. (Suse *v.* Pompe, II. 173; Mellish *v.* Simeon, II. 116; Wood *v.* Kelso, II. 228.) By statute or usage a fixed amount is, in some jurisdictions, payable by way of damages instead of re-exchange. (Auriol *v.* Thomas, II. 112; Gantt *v.* Mackenzie, II. 123; Slacum *v.* Pomery, II. 199.)

DRUNKENNESS. (See INTOXICATION.)

DUE BILL.
Not a note, unless containing words of negotiability. (FORMAL REQUISITES, § 5.)

DURESS.
Is a personal defense. (DEFENSES, § 5.)
Bars an action by a transferee after maturity. (OVERDUE PAPER, § 4.)

E.

EFFECTS.
Drawing without. (DILIGENCE DISPENSED WITH, WHEN, § 2.)

EPIDEMIC.
Excuses delay in sending notice. (NOTICE OF DISHONOR, § 14.)

EQUITABLE DEFENSES. (See DEFENSES, §§ 4, 5; EXTINGUISHMENT, §§ 16–19; OVERDUE PAPER, § 4; PURCHASE FOR VALUE, §§ 4, 5.)

EQUITIES. (See EQUITABLE DEFENSES.)

EQUITY.
Remedy in, on a lost or destroyed bill. (ACCEPTOR AND MAKER, § 6.)

ESCROW. (See DELIVERY.)

ESTOPPEL. (PURCHASE FOR VALUE, § 8; II. 784.)

EXCHANGE.

Promise to pay, does not destroy negotiability. (FORMAL REQUISITES, § 19.)

EXCHEQUER BILLS. (NEGOTIABLE PAPER, § 1.)

EXCUSABLE DELAY.

In presentment. (PRESENTMENT FOR PAYMENT, §§ 6, 7.)

In sending notice. (NOTICE OF DISHONOR, §§ 13–16.)

EXCUSES.

For not making presentment and giving notice of dishonor. (DILIGENCE DISPENSED WITH, WHEN.)

EXECUTION.

Bills may be taken in, when. (CHATTELS, § 7.)

EXECUTOR (OR ADMINISTRATOR).

Title to bills of a testator vest in. (TRANSFER, § 13.)

Bills of deceased transferable by. (TRANSFER, § 15.)

Any one of several executors may indorse a bill of the testator. (I. 391, n. 1.)

Bill payable to executors must be indorsed by all. (I. 391, n. 1.)

Indorsement by, of bill delivered by the testator is valid. (Watkins *v.* Maule, I. 332.)

Delivery by, of bill indorsed by testator is not an indorsement. (INDORSEMENT, § 17.)

Delivery by executor, as such, to himself individually. (TRANSFER, § 12.)

Bill payable to a person supposed to be living is payable to his. (I. 389, n. 1.)

Presentment to, when proper. (PRESENTMENT FOR PAYMENT, § 20.)

Delay in presentment by, excusable when. (PRESENTMENT FOR PAYMENT, § 6.)

Notice to, when proper. (NOTICE OF DISHONOR, § 33.)

Notice to, when unnecessary. (DILIGENCE DISPENSED WITH, WHEN, § 15.)

Bill in hands of acceptor at maturity as executor of holder is assets. (EXTINGUISHMENT, § 7.)

Bills payable to executor of A. in his representative capacity pass on his death to the administrator *de bonis non* of A. (Catherwood *v.* Chabaud, 1 B. & C. 150; Sheets *v.* Pabody, 6 Blackf. 120.)

Administrator taking out letters of administration where the bills of the deceased are, may transfer them. (I. 389, n. 1; Robinson *v.* Crandall, I. 325.)

Transfer by, of bills of the testator in payment of executor's own debt. (I. 630, n. 1.)

Addition of word "executor" to signature does not make indorsement restrictive. (I. 708, n. 1.)

EXTINGUISHMENT.

1. If the title to a bill or note has once become vested in the payee, nothing short of a physical destruction, cancellation, or alteration of the instrument, or its retransfer to the acceptor or maker (or to the drawer or drawee, if the bill was not accepted), can afterwards extinguish it. A bill, it will be seen, resembles in this respect a bond.

EXTINGUISHMENT— *continued.*

PHYSICAL DESTRUCTION.

2. If a bill is intentionally destroyed by the holder, he forfeits all rights against every party to it. (II. 65, n. 10.) But if the destruction is accidental, although the right to recover at law is lost, the holder may still proceed in equity. (ACCEPTOR AND MAKER, § 6; DRAWER AND INDORSER, § 5.)

CANCELLATION.

3. A cancellation by the holder *animo cancellandi* is equivalent to a destruction of the instrument. (Yglesias *v.* River Bank, 3 C. P. D. 60.) It is difficult to state with accuracy what will be a sufficient cancellation to affect a purchaser with notice, but it seems clear that there was an adequate cancellation in Ingham *v.* Primrose, I. 530; and it is therefore not surprising to find that the opinion of the court in that case to the contrary has been overruled. (Baxendale *v.* Bennett, I. 554.)

ALTERATION.

4. A material alteration is equivalent to a destruction of the instrument. (Master *v.* Miller, I. 447, n. 1.)

RETRANSFER.

5. The retransfer of a bill or note to the acceptor or maker at maturity (and generally also after maturity, see *infra*) is an extinguishment of the instrument. For as the immediate right to demand, and the immediate duty to make payment concur in the same individual, the obligation is necessarily discharged. The same principle applies, of course, although the retransfer is before maturity, if the acceptor or maker retains the paper until maturity. (Harmer *v.* Steele, I. 820, 824, n. 2.)

Voluntary Extinguishment.

6. The extinguishment may, and commonly does, give effect to the intention of the parties, as where the paper is surrendered either by way of gift or upon payment. (Bartrum *v.* Caddy, I. 814; I. 841, n. 2; II. 65, n. 10.)

Extinguishment by Operation of Law.

7. But the extinguishment may also occur by operation of law without regard, or even in opposition to the intention of the parties, *e. g.*,

a transfer to the acceptor or maker as executor of the holder (Freakley *v.* Fox, I. 811);

or a transfer to the wife of the acceptor or maker (Abbott *v.* Winchester, I. 877);

or a transfer to the husband of the acceptor or maker, the paper having been executed by the wife before marriage. (Chapman *v.* Kellogg, I. 874.) In this case, indeed, the note was held to be extinguished, although by statute a husband was not liable for the debts of his wife contracted before marriage. (*Sed quære*, and see *infra*, OVERDUE PAPER, § 7.)

or a transfer to an anomalous indorser in jurisdictions where such an indorser is treated as a joint maker. (Pray *v.* Maine, I. 873.)

When the Retransfer should be made.

8. The retransfer should regularly be made at maturity. Overdue paper being simply a *chose in action*, an acceptor or maker pays it at his peril, even though negotiable by delivery, just as a purchaser buys such paper at his own risk. Possession, in other words, of paper negotiable by delivery does not prove property after maturity either to a payor or purchaser. (Hinckley *v.* Union Pacific R. R., 129 Mass. 52.)

EXTINGUISHMENT—*continued.*

9. In one respect the position of an acceptor or maker differs from that of a purchaser. A purchase before maturity is in the regular course of business. A payment before maturity, on the other hand, is out of the regular course of business. Therefore, although a purchaser before maturity, from the ostensible owner of paper negotiable by delivery, acquires a good title (PURCHASE FOR VALUE, § 1), an acceptor or maker, who takes up such paper before maturity, gets only the title of the ostensible holder, and, accordingly, if he has none, the acceptor or maker will be liable to a subsequent action by the real holder. (De Silva *v.* Fuller, I. 807; Wheeler *v.* Guild, I. 866, 870, *semble.*) So also a payment before maturity to the true holder is no bar to an action by a subsequent holder without notice of the prior payment. (Burbridge *v.* Manners, I. 465, 466, n. 1.)

But an acceptor or maker may acquire a bill or note before maturity, not with the design of taking it up, but as an ordinary purchaser, and in such a case he may, like any purchaser, negotiate the paper further. (Attenborough *v.* Mackenzie, I. 842, 844, n. 1.)

To whom the Retransfer should be made.

10. The retransfer, to work an extinguishment, should be made to the acceptor or maker. If the instrument is returned to the drawer or indorser, it is, as a rule, not extinguished, but the retransferee is simply remitted to his former position, and being once more the holder, he may bring an action upon the paper, or transfer it afresh by reindorsing it. (Serra *v.* Berkley, I. 803; Callow *v.* Lawrence, I. 809, 811, n. 1.)

If, however, a bill payable to a third person is taken up by the drawer, it cannot be afterwards negotiated unless through the payee (Beck *v.* Robley, I. 806); but Lord Mansfield's statement, that the instrument in that case ceased to be a bill, was inaccurate.

Even an accommodation acceptance or note is not extinguished at law by a retransfer to the drawer or payee for whose accommodation the paper was given (Lazarus *v.* Cowie, I. 818); but the retransfer in such cases would operate in equity as a virtual extinguishment. (See *infra*, §§ 16–19.)

Mode of Retransfer.

11. All paper, whether negotiable by delivery or indorsement, may be retransferred by a simple delivery. (See TRANSFER, § 11.)

If, indeed, the retransfer is by operation of law, no actual delivery is necessary. (See TRANSFER, § 13.)

By whom the Retransfer must be made.

12. The requisites of a retransfer being substantially the same as those of a transfer to a new holder, it follows that a retransfer by one who holds the bill under a forged or unauthorized indorsement is not an extinguishment of the bill, and a payment to such a holder will be no bar to a subsequent action by the lawful holder. (Smith *v.* Sheppard, I. 804, 805, n. 1.)

13. But a payment at maturity to, and retransfer by, the holder and ostensible owner of paper, payable to bearer or indorsed in blank, will extinguish the paper, for an acceptor or maker in such a case occupies a position analogous to that of a purchaser for value without notice before maturity. (Anonymous, I. 802 and n. 2.)

By the same analogy, however, a retransfer by way of gift is no extinguishment of paper negotiable by delivery, unless the donor was the legal holder, for the donee in such a case is in no better position than a purchaser who gives no value.

EXTINGUISHMENT — *continued.*

14. A payment to, and retransfer by, an agent, as agent, of the holder, will not work an extinguishment, whether the paper be negotiable by delivery or by indorsement, unless the agent was actually authorized to receive payment. (I. 802, n. 2.)

15. A bill would doubtless be extinguished by a payment to, and retransfer by,

a trustee;

or a pledgee who retains the bill, notwithstanding the pledgor has paid the debt secured thereby; the case of Wheeler *v.* Guild, I. 866, is not inconsistent with this proposition, for in that case there was no retransfer of the note by the pledgee to the maker (see also *infra*, § 17);

or one who had already received the amount of the bill from the drawer or an indorser, provided the drawer or indorser had not reacquired possession of the paper (Jones *v.* Broadhurst, I. 824; Williams *v.* James, I. 832; Agra Bank *v.* Leighton, I. 855; Thornton *v.* Maynard, I. 861); for the holder after such payment holds as trustee for the drawer or indorser; if the payment is partial only, the holder is trustee *pro tanto*. (Johnson *v.* Kennion, I. 803; *Re* Souther, I. 878.) The case of Bacon *v.* Searles, I. 807, unless, as seems probable, the bill in that case was an accommodation bill, is overruled. (I. 880.)

or a fraudulent vendee, before the vendor has elected to avoid the sale; (see Prouty *v.* Roberts, I. 853); or even after such election, if the acceptor or maker has no notice of it. Payment and retransfer after notice of the vendor's election to avoid the sale would, of course, be wrongful, but whether payment and retransfer under such circumstances would prevent the extinguishment of the bill has not been, it is believed, expressly decided, and must depend upon the effect of such an election unaccompanied by a reacquisition of the instrument by the vendor. The defrauded vendor of land cannot regain the legal title without a reconveyance by the fraudulent grantee, and this principle seems equally applicable to other kinds of property. But in the case of personal property the courts of common law have assumed a power greater even than that exercised by a court of equity in the case of land, and maintain generally that the defrauded vendor of a chattel may by his own act revest the title in himself; and it is quite probable that they would apply this anomalous doctrine to negotiable paper.

Extinguishment in Equity.

16. Although a bill or note has been neither destroyed nor retransferred to the acceptor or maker, and therefore is not extinguished at law, the acceptor or maker may nevertheless have acquired an equity against the holder which will reduce his title to the paper to a dry legal interest; and if this equity is acquired at or after maturity, inasmuch as every subsequent transferee will be bound by it, the acceptor or maker will be for all practical purposes in the same position which he would occupy if the instrument were extinguished at law.

Thus, a gift by the holder unaccompanied by delivery to the acceptor or maker will not transfer the legal title; but it will pass the beneficial interest, and the acceptor or maker, as *cestui que trust*, could in equity enjoin a subsequent action by the donor as trustee, or any transferee of the donor after maturity. The gift, therefore, practically nullifies the in-

EXTINGUISHMENT — *continued.*

strument, and as the courts of common law have so far strained their jurisdiction as to permit the donee to plead the equitable right to an injunction as if it were a legal defense (see DEFENSES, § 4), it is frequently said that a gift by the holder without a surrender of the bill, or a mere parol discharge of the acceptor or maker, extinguishes the instrument. (Foster *v.* Dawber, I. 837, 841, n. 2.)

By the same principle a payment by the acceptor or maker to the lawful holder without a retransfer regularly converts the latter into a trustee for the former, and there would be the same equitable bar to a subsequent action as in the case of a gift.

17. In certain cases the equity acquired by the acceptor or maker against the holder may be overridden by a stronger equity in favor of another person, *e. g.*, payment by the acceptor or maker to a pledgee who had previously been paid the principal debt by the pledgor, although an equitable bar to an action by the pledgee will not be permitted to defeat an action by the pledgor, who has reacquired the bill from the pledgee. For the pledgor has the prior equity. (Wheeler *v.* Guild, I. 866.)

Nor, it is believed, would payment to a fraudulent vendee, without a retransfer of the paper, bar a subsequent action by the defrauded vendor.

Nor would a payment to one who had previously sold but not delivered the bill bar an action by the purchaser to whom the bill was subsequently transferred.

18. The acceptor or maker can, of course, acquire no equity against the legal holder except by a payment to him, *e. g.*, a payment to one who had previously transferred the paper will not affect the rights of the transferee. (Milnes *v.* Dawson, I. 835, 837, n. 1.)

19. As we have seen, *supra*, § 10, a retransfer to a drawer or indorser does not extinguish a bill or note, even though the paper was given for the accommodation of the party who takes it up. But although the accommodation acceptor or maker is still strictly liable at law to the accommodated party, the latter, having contracted to indemnify the acceptor or maker, would have to repay, as defendant in a cross action, whatever he might recover as plaintiff upon the bill or note. A court of equity will, therefore, enjoin the first action; and as the courts of common law, to avoid the scandal of two actions where there ought to be none, permit the defendant to set up his counter claim as if it were a legal defense, it is sometimes stated as a rule of law that payment at maturity by a drawer or payee of a bill or note made for their accommodation is an extinguishment of the instrument. (I. 819, n. 2; Cook *v.* Lister, I. 844.)

Payment by the accommodated party of a part only of what is due enures as an extinguishment in equity *pro tanto*. (I. 880, n. 1.)

F.

FAILURE OF CONSIDERATION. (See CONSIDERATION.)

FEME COVERT. (See COVERTURE.)

FICTITIOUS NAME.

Signing a. (I. 347, n. 3.)

FICTITIOUS PAYEE.
When holder can recover on a bill payable to a. (See PURCHASE FOR VALUE, § 2 (*a*).)

FORBEARANCE.
Agreement for, makes one a holder for value. (PURCHASE FOR VALUE, § 8.)
Agreement for, when a discharge to parties to a bill. (DEFENSES, § 5.)

FOREIGN BILLS. (See also CONFLICT OF LAWS.)
Bills payable in a different jurisdiction from that in which the obligation of the drawer is to be performed are. (II. 351, n. 1; II. 114, n. 1; and see especially Strawbridge *v.* Robinson, 10 Ill. 470, cited II. 240, n. 4.)
Bills ostensibly, may be shown to be inland to prevent evasion of stamp laws (Bennison *v.* Jewison, I. 512, 513, n. 1); in Barker *v.* Sterne the bill took effect by relation as a foreign bill.
Must be presented by a notary. (PRESENTMENT FOR PAYMENT, § 15.)
Must be protested. (DRAWER AND INDORSER, § 3.)
Entitled to days of grace. (GRACE.)

FORGERY.
Of drawer's signature no defense to action against acceptor. (ACCEPTOR AND MAKER, § 1.)
Prior, no defense to action against indorser. (DRAWER AND INDORSER, § 1.)
Of amount before acceptance immaterial. (ACCEPTOR AND MAKER, § 1; CHECKS, § 10.)
Holder, except in cases above mentioned, can acquire no title to a forged bill (PURCHASE FOR VALUE, § 3 (*c*)), or to a genuine bill through a forged indorsement. (PURCHASE FOR VALUE, § 2.)
Payment to holder of a forged bill, except in the three cases first mentioned, or to a holder of a genuine bill under a forged indorsement, may be recovered, it has been decided, as money paid under a mistake of fact. (I. 433, 434, n. 2; I. 591, n. 1.)
Payment to holder under a forged indorsement is no bar to an action by the true holder. (EXTINGUISHMENT, § 12.)
Incapable of ratification. (Brook *v.* Hook, L. R. 6 Ex. 89; Workman *v.* Wright, 33 Ohio St. 405.)
Forged paper is not a valid payment of antecedent debt in the absence of laches. (SPECIALTY, § 7.)
Transferor by delivery or indorser without recourse warrants genuineness of bill. (II. 242, n. 1.)

FORMAL REQUISITES OF BILLS AND NOTES.
ORDER.
1. A bill must contain an order to pay, *i. e.*, it must import a right on the part of the drawer to command, and a duty on the part of the drawee to make, the payment indicated in the bill. (Little *v.* Slackford, I. 3, *semble;* King *v.* Ellor, I. 5 and n. 1.)
2. An instrument containing a mere authority to pay, *e. g.*, "We hereby authorize you to pay, on our account, to the order of W. G.," etc., is not a bill. (I. 5, n. 1.)
Nor an instrument containing a request of payment as a favor, *e. g.*, "Please to let the bearer have seven pounds," etc., or "Please to send £10 by the bearer," etc. (Little *v.* Slackford, I. 2; King *v.* Ellor, I. 5.)

FORMAL REQUISITES OF BILLS AND NOTES — *continued.*

But the insertion of words of civility does not convert an order into a request, *e. g.*, an instrument in the following form: — "Mr. Nelson will much oblige Mr. Webb by paying to J. Ruff, or order, twenty guineas on his account," is a bill; so also an instrument reading, "Please pay," etc. (Ruff *v.* Webb, I. 1; I. 3, n. 1; Leonard *v.* Mason, I. 57.)

3. Whether an instrument is a bill, and whether the payee can maintain an action upon it, are distinct questions, the first of which must be answered by what appears upon the face of the instrument, while in determining the second, the character of the delivery is to be considered. This distinction was overlooked in Norris *v.* Solomon, I. 3, where, although the payee could not have succeeded in an action against the drawer, the instrument contained all the formal requisites of a bill, it being now settled law that words of negotiability are not necessary in a bill.

PROMISE.

4. A note must contain a promise. The promise need not be in any set form of words; any words fairly importing an actual promise to pay are sufficient; *e.g.*, —

"I owe," etc., "to be paid on demand," etc., or "I O U £20 to be paid on the 22d inst.," etc. (Casborne *v.* Dutton, I. 6; Brooks *v.* Elkins, I. 8; see Ellis *v.* Mason, I. 9.)

"Good to A. or order for $100," etc. (Franklin *v.* March, I. 18.)

An ordinary certificate of deposit is a note. (Bank of Orleans *v.* Merrill, I. 20 and n. 3.)

An acceptance written upon an unsigned promissory note or bill is a note (Block *v.* Bell, I. 7; Drummond *v.* Drummond, I. 883; Peto *v.* Reynolds, I. 106);

but an order in an instrument containing no drawee is not a note. (Forward *v.* Thompson, I. 13; see, however, Almy *v.* Winslow, 126 Mass. 342, *contra.*)

5. A promissory note is a new obligation and not simply evidence of an old obligation. An acknowledgment of indebtedness is evidence of an old obligation, but creates no new obligation. Accordingly

an I O U or a non-negotiable due bill, *e.g.*, "Due A. B.," etc., is not a note (Fisher *v.* Leslie, I. 6; Hyne *v.* Dewdney, I. 11, *semble;* Currier *v.* Lockwood, I. 21; Smith *v.* Allen, I. 15);

even though the instrument contains a promise to pay interest (Taylor *v.* Steele, I. 10);

but an instrument reading "Due A. $100 on demand," has been held to be a note. (Smith *v.* Allen, I. 15; see, however, Hyne *v.* Dewdney, I. 11.)

On the other hand, a due bill containing words of negotiability necessarily imports a promise; *e.g.*, —

"Due A. or bearer." (Russell *v.* Whipple, I. 17.)

UNCONDITIONAL ORDER OR PROMISE.

6. A bill or note must be payable absolutely, *i.e.*, it must be subject to no conditions, except the implied conditions of presentment, protest, and notice of dishonor, which attach by the custom of merchants to negotiable paper as such. Accordingly an instrument is not a bill or note if it contains an order or promise to pay

ten days after A's. marriage (Beardsley *v.* Baldwin, I. 30, and n. 2);

or at a fixed time, "if I am then living," or provided certain things are

FORMAL REQUISITES OF BILLS AND NOTES — *continued.*
done (Braham *v.* Bubb, I. 32, 33, n. 1; Kingston *v.* Long. I. 31; Smilie *v.* Stevens, I. 95; the decision in Adams *v.* Franklin, I. 27, *contra*, is erroneous);
or "if A. does not pay" (Appleby *v.* Biddolph, I. 28 and n. 1; I. 33, n. 1);
or an order or promise to pay or do something else (Smith *v.* Boheme, I. 24, 25, n. 1);
or a promise with a defeasance in the form of a condition subsequent (Hartley *v.* Wilkinson, I. 31, 32, n. 3; Richardson *v.* Martyr, I. 36);
or an order or promise to pay out of a particular fund (Josselyn *v.* Lacier, I. 25, 27, n. 1; Jenney *v.* Herle, I. 28, 29, n. 1); but an instrument is none the less a bill, although it contains a reference to a particular fund from which the party paying shall reimburse himself (Macleod *v.* Snee, I. 30 and n. 1);
or a guarantee of payment written upon a note by a stranger. (I. 33, n. 1, last paragraph; see *infra*, § 8.)
7. An instrument does not become a bill or note upon the fulfilment of the condition. It must be a bill or note when executed, if ever. (Kingston *v.* Long, I. 31; Colehan *v.* Cooke, I. 87–88.)
Accordingly an instrument containing a mere offer, *e.g.*, a promise to pay in consideration of goods to be supplied, is not a note. (Jarvis *v.* Wilkins, I. 34, 35, n. 1; compare Shenton *v.* James, I. 35, where the promise was for a consideration already received.)
8. If the instrument is on its face payable absolutely, it is a note, although not expressed in the usual or most appropriate words, *e.g.*, "I promise to pay or cause to be paid," or "I guarantee to pay." (Lovell *v.* Hill, I. 33 and n. 2.)
9. A bill or note payable "on demand" or "at sight," or a certificate of deposit payable "on the return of this certificate," or a bill payable at a fixed period "after sight," are of course negotiable, as these words add nothing to the burden imposed by the law-merchant upon the holder of negotiable paper. It has been decided, also, that a note may be payable at a fixed period "after notice" or "after demand" (Walker *v.* Roberts, I. 88 and n. 3; Thorpe *v.* Booth, II. 33 and n. 4); but the objections to such a note as a negotiable instrument seem not to have been duly considered. (See *infra*, § 23.)
10. It is not enough that an instrument contains no condition in the strict sense of the term. It must also appear upon its face to be payable absolutely. An order or promise, therefore, to pay, if a certain event has already happened, cannot be a bill or note. But the point seems not to have been discussed.

PAYABLE IN MONEY.

11. A bill must be payable in money, *i.e.*, in what is a legal tender in payment of debts at the place of payment. Accordingly an instrument is not a bill or note if payable in
"bank notes," unless they are legal tender (Rex *v.* Wilcox, I. 39 and n. 2. Conf. Searcy *v.* Vance, I. 49);
or "currency," "current funds," or "current bank notes" (I. 48, n. 4, second paragraph; but see *contra*, Judah *v.* Harris, I. 47, 48, n. 4);
or "foreign money," *e.g.*, a bill payable in New York in "Canada money."

FORMAL REQUISITES OF BILLS AND NOTES — *continued.*

(Thompson *v.* Sloan, I. 51, n. 2; Chrysler *v.* Renois, I. 51; but see *contra*, St. Stephen R. R. *v.* Black, I. 45, 46, n. 1.) But the amount of a bill may be expressed in money of a foreign denomination, if the bill is not payable in foreign money, *e.g.*, an English bill for £100 payable in the United States. (Thompson *v.* Sloan, I. 51, n. 2 and n. (*a*)).

12. If there are two or more kinds of legal tender at the place of payment, a bill or note may be made payable in any one of them, *e.g.*, in the United States a bill may be made payable in gold, silver, or legal tender notes. (Chrysler *v.* Renois, I. 50.) The opinion expressed (I. 39, 40, n. 2), that legal tender notes are not money, however sound in political economy, is unsound in law.

13. The payment in money need not be expressed in any set form of words, *e.g.*, —

"Credit A. or order with $500 cash," etc., is equivalent to "pay A. $500," etc. (Ellison *v.* Collingridge, I. 42, 44, n. 1.)

"Pay the within note," etc., is the same as "pay the amount of within note," etc. (Leonard *v.* Mason, I. 57 and n. 2.)

"Account to A. or order for $100," etc., means "pay A. or order," etc. (Morris *v.* Lee, I. 39);

but "account to A.," etc., without words of negotiability, is not the same as "pay to A.," etc. (Horne *v.* Redfearn, I. 40, 42, n. 1.)

A Bill or Note must not contain an independent Order or Agreement.

14. If a wholly independent and non-negotiable agreement is incorporated in the same instrument with a bill or note, the whole instrument is thereby rendered non-negotiable, *e.g.*, a promise to pay money and also to deliver up horses and a wharf. (Martin *v.* Chauntry, I. 53 and n. 1; Leonard *v.* Mason, I. 57.)

15. But an agreement relating to the bill or note itself, and annexed to it merely as an incident, although not itself negotiable, will not destroy the negotiability of the bill or note; *e.g.*, —

a promise to pay any deficiency arising upon a sale of property pledged as security for the payment of the bill or note (Arnold *v.* Rock River R.R., I. 61, 65, n. 1; Towne *v.* Rice, I. 591; see Cowie *v.* Stirling, I. 121, n. 1);

or a promise to give the holder, at his option, and upon his surrender of the note, a certain number of shares of stock, or goods, instead of the money called for by the note (Hodges *v.* Shuler, I. 65, 67, n. 1; Hostatter *v.* Wilson, I. 67, 69, n. 1);

or a promise to pay attorney's fees and costs of collection, if the bill or note is not paid at maturity. (Sperry *v.* Horr, I. 80, 82, n. 7. But see Jones *v.* Radatz (Minn. 1880), 11 C. L. J. 512; First Bank *v.* Bynum, 84 N. Ca. 24, *semble*; Johnson *v.* Speer (Pa. 1881), 15 West. Jur. 118, *contra*. See *infra*, § 19.)

16. In jurisdictions where a chose in action is not assignable, these incidental agreements can be enforced only in the name of the original payee; and under certain circumstances, whether assignable or not, they may be, or become, wholly inoperative. Thus, if the instrument should be procured from the maker by fraud and transferred to a holder for value without notice, such holder could maintain an action upon the note, but the fraud

FORMAL REQUISITES OF BILLS AND NOTES — *continued.*

would be a complete defense to any action either by the payee or assignee upon the incidental agreement; or, again, if the payee, being the lawful owner of the instrument, should be induced by fraud to indorse it, and the fraudulent indorsee should transfer it to a holder for value without notice, the holder would of course acquire a perfect title to the note, but he could not obtain the benefit of the incidental agreement, nor could the payee who had lost his title to the note or principal part of the instrument retain the power to enforce the subordinate agreement. By a transfer under such circumstances that part of the instrument would be in effect extinguished. It may be urged that these consequences are arguments for considering the whole instrument non-negotiable. Such a construction would, however, be a sacrifice of the essence of the instrument for the sake of its incident. On the other hand, if the accompanying agreement is wholly independent of the note, as in Martin *v.* Chauntry, *supra*, § 14, neither can be considered as principal or incident.

17. If an agreement annexed as an incident to a note will not destroy its negotiability, *a fortiori* the insertion of a waiver of legal defenses can have no such effect, *e.g.*, "without defalcation or discount," or "waiving the right of appeal and of all valuation, appraisement, stay, and exemption laws" (Zimmerman *v.* Anderson, I. 70, 72, n. 2);

nor the insertion of a warrant of attorney to confess judgment (Sperry *v.* Horr, I. 80, 81, *semble;* I. 60, n. 1; but see *contra*, Overton *v.* Tyler, I. 58, 60, n. 1);

nor the insertion of a memorandum of a deposit of title deeds as security for a note, *e.g.*, "I have deposited in his hands title deeds," etc., "as collateral security," or "this note is secured by a mortgage to be recorded in registry of deeds for S. Co., lib. —, fol —." (Wise *v.* Charlton, I. 53, 56, n. 2.)

DEFINITE AMOUNT OF MONEY.

18. An instrument in which the amount of money payable is not determinable by inspection is not a bill or note, *e.g.*, a promise "to pay $65 and also all other sums which may be due to him." (Smith *v.* Nightingale, I. 73, 74, n. 2.)

19. But if the amount payable at maturity is certain, a promise to pay an additional though uncertain amount in the event of non-payment at maturity, will not affect the negotiability of the instrument, *e.g.*, a promise to pay a fixed sum and "also attorneys' fees and expenses of collection, if this note is not paid at maturity." (Sperry *v.* Horr, I. 80, 82, n. 7; see *supra*, § 15.)

Nor should a note lose its negotiability because it contains also an agreement to pay the current rate of exchange. (I. 80, n. 1; but see *contra*, Philadelphia Bank *v.* Newkirk, I. 79, 80, n. 1.)

20. An instrument containing a promise to pay money in instalments, with a stipulation that upon the default in payment of any one instalment all the others shall become at once due and payable, is obviously uncertain as to the amount, and also as to the time of payment of all instalments except the first. Furthermore, it will frequently be impossible to determine without inquiry into extrinsic circumstances whether the instrument has been dishonored or not; indeed, such an instrument is entirely special in its nature, and not intended for circulation as a negotiable instrument. It is

FORMAL REQUISITES OF BILLS AND NOTES — *continued.*

to be regretted, therefore, that the dissenting opinion of Pollock, C. B., in Miller *v.* Biddle, I. 77, did not prevail. It must be conceded, however, that in the few cases in which the courts have been called upon to pass upon the character of such instruments, they have declared them to be negotiable. (Carlon *v.* Kenealy, I. 74, 75, n. 1; Miller *v.* Biddle, I. 76; Zimmerman *v.* Anderson, I. 71, *semble.*)

CERTAINTY AS TO TIME OF PAYMENT.

21. The time of payment of a bill or note must be obvious from the bare inspection of the instrument, or else must be determinable by the holder by the simple act of presentment for acceptance or payment, that is to say, by the performance of an act regularly incident to the collection of the paper.

This rule, although clearly deducible from the nature of a bill or note as a representative of money, has been in many cases ignored by the courts, and the contrary doctrine put forward, that, if an instrument is finally payable at all events, no degree of uncertainty as to the precise time of payment will destroy its negotiability. Thus it was held in an early English case (Colehan *v.* Cooke, I. 83; see also Andrews *v.* Franklin, I. 27), that an instrument containing a promise to pay "ten days after the death of my father" was a negotiable note; and in Massachusetts, in Cota *v.* Buck, I. 93, a similar decision was made upon an instrument payable "in the course of the season now coming, or sooner, if realized out of property I have bought this day of J. P." These decisions have been followed in other jurisdictions (I. 88, n. 2; I. 94, n. 5; I. 97, *semble*), but they have been greatly impeached, if not actually overruled, in the jurisdictions in which they were given. (Alexander *v.* Thomas, I. 89; Stults *v.* Silva, I. 98.) Certainly, instruments like those above mentioned are wholly foreign to the custom of merchants. For nothing could be more inconsistent with the negotiability of a bill or note than that the holder should have to be continually on the alert to ascertain the precise day when the instrument should become payable, in order to charge the drawer or indorser. (See Alexander *v.* Thomas, I. 90; MacArthur Stewart *v.* Fullarton, I. 92.) Furthermore, it is impossible to attach a definite value to anything so speculative in its nature as an obligation payable, as in Colehan *v.* Cooke, so many days after the death of J. S.

22. Neither of the objections just suggested applies to a note payable, at the option of the maker, on or before a fixed day; and such a note is negotiable. (Jordan *v.* Tate, I. 100.) The option of the maker seems indeed to be of no significance, except in the case of interest-bearing instruments, and even in these the fact that the maker may by a tender bar the right of him to whom the tender is made to claim interest accruing subsequent to the tender seems hardly to render the instrument uncertain in the commercial sense of the term. (But see *contra*, Stults *v.* Silva, I. 98.)

23. Within the second branch of the rule as to certainty of payment above stated (§ 21), a bill or note may be made payable "at sight," "on demand," or "upon the return of this certificate," if the note is in the form of a certificate of deposit (Smilie *v.* Stevens, I. 95), and a bill may be made payable at a fixed time "after sight."

It has been held also that a promise to pay at a fixed time "after notice" or "after demand" is a good note. (Walker *v.* Roberts, I. 88 and n. 3; see Thorp *v.* Booth, II. 33 and n. 4.) But the objection seems not to have

FORMAL REQUISITES OF BILLS AND NOTES — *continued.*
been taken that notice, or presentment to the maker, except for payment, are special conditions wholly independent of the custom of merchants.
24. A note with no time of payment expressed is payable on presentment. (Herrick *v.* Bennett, I. 93 and n. 1.)

CERTAINTY AS TO PARTIES.

Drawer.

25. An unsigned order for the payment of money is obviously not a bill. (M'Call *v.* Taylor, I. 101.) But such an order, if accepted by the drawee, may be negotiated indefinitely, the acceptance being in effect a promissory note (Drummond *v.* Drummond, I. 883); and it is also held that the rightful holder may insert his own name as drawer, and treat the instrument in pleading as an accepted bill of exchange. (Harvey *v.* Cane, I. 881; Scard *v.* Jackson, I. 883, n. 1; Smith *v.* Taylor, I. 884, n. 1; but see Hogarth *v.* Latham, I. 548; PURCHASE FOR VALUE, § 13 (*f*).)

Drawee.

26. An order which is not addressed to any person cannot be a bill (Peto *v.* Reynolds, I. 106); nor can the drawer be charged as the maker of a note (*supra*, § 4; see also Shuttleworth *v.* Stephens, I. 104); but such an order, if accepted, may be negotiated, the acceptance being, in effect, a promissory note. (Peto *v.* Reynolds, I. 106, 111, n. 1.)
27. The drawee was held to be sufficiently indicated in a bill addressed, "At Messrs. John Morson & Co.," the word "at" being considered equivalent to the word "to." (Shuttleworth *v.* Stephens, I. 104, and n. 3.) But the correctness of this interpretation seems doubtful.

An order addressed simply "At No. 1 Wilmot Street," no one being named as drawee, is not a bill, nor can it become one even though accepted by a person belonging to the house. Gray *v.* Milner, I. 104, is *contra*, but this case has been deservedly criticised (Davis *v.* Clarke, I. 203, 204); and since the case of Peto *v.* Reynolds, I. 106, must have possessed but little authority. The defendant in Gray *v.* Milner should have been charged as the maker of a note.

28. A bill, being an order, cannot be addressed to the drawer himself; but an instrument in which the ostensible drawer and drawee are the same person is a good note. (Miller *v.* Thomson, I. 138, 141, n. 1.) The misdescription, however, of such an instrument as a bill in an indictment, the instrument itself being set forth, is not a sufficient ground for quashing the indictment. (Commonwealth *v.* Butterick, I. 143.)

Payee.

29. An instrument in which no payee is named is not a bill or a note (Rex *v.* Randall, I. 113 and n. 1);

nor one in which the ostensible payee is not a person either natural or legal, *e. g.*, an instrument payable to the estate of A. B. deceased (I. 122, n. *a*), nor, for the same reason, an instrument in which the ostensible payee is the same person as the acceptor or maker (Regina *v.* Bartlett, I. 118; Hooper *v.* Williams, I. 131, n. 1; Commonwealth *v.* Dallinger, I. 130); but such an instrument may be made a valid bill or note by indorsement (Hooper *v.* Williams, *supra*; Commonwealth *v.* Dallinger, *supra*); and an instrument blank as to the payee may be negotiated, and, in the absence of any stipulation by the parties executing it to the contrary, any rightful holder may make it complete by the insertion of his own name as payee. (Cruchley *v.* Clarance, I. 128, 129, n. 1,)

FORMAL REQUISITES OF BILLS AND NOTES — *continued.*

80. An instrument made by or payable to a partnership of which the payee or maker, respectively, is a member, is a valid bill or note; for, although no action is allowed upon such paper before indorsement, the partnership and the partner are distinct persons. (I. 133, n. *b.*)

81. It is enough if the payee is indicated by reasonable intendment, though not expressly named as such, *e. g.*, "I owe A." &c., "which I promise to pay." (Chadwick *v.* Allen, I. 112.)

So in a bill payable to the order of A., A. is the payee, just as if the bill were payable to A., or order. (Fisher *v.* Pomfret, I. 112.)

82. The payee must be ascertainable at the time the bill or note is issued. For this reason an obligation payable "to the secretary for the time being of the Indian Assurance Society" (an unincorporated company) was held not to be a note (Cowie *v.* Stirling, I. 119, 124, n. 1); but the rule seems to have been misapplied in this case, for if, as it is natural to suppose, the instrument was intended to take effect from the time of its delivery, it should have been interpreted as payable to the person to whom it was delivered, *i. e.*, the person who was secretary at that time.

By the same rule of interpretation there is no uncertainty as to the payee in a note payable "to A. B., secretary, or his successor in office," or "to A. B. and his heirs," for no one but A. B. can be payee, the reference to his successors or heirs being altogether nugatory. (King *v.* Box, I. 114, 116, n. 1; Knight *v.* Jones, I. 129.)

83. It is held that a bill or note cannot be made payable to the order of A. or B. in the alternative. (Blanckenhagen *v.* Blundell, I. 116, 118, n. 1.) But a note is valid if payable "to A., or to B., the agent of A.," for in this case A. alone can be the holder (Holmes *v.* Jaques, I. 126, 128, n. 1); or if payable "to A., B., and C., or to their order, or the major part of them." (Watson *v.* Evans, I. 124.)

84. PLACE OF PAYMENT. (See I. 145.)

DATE. (See I. 145.)

STAMP. (See I. 145.)

FORM OF SIGNATURE. (See I. 145.)

MATERIAL REQUISITES. (See I. 145.)

VALUE RECEIVED. (See I. 19 and n. 3.)

DELIVERY.

Necessity of Delivery.

85. A bill or note, as against a drawer or maker, becomes operative only from its delivery (Chapman *v.* Cottrell, I. 134, 135, n. 1); but the delivery may take effect by relation as of a previous time (Barker *v.* Sterne, I. 527); and the delivery may be effectual although the payee is not aware of the existence of the bill or note. (SPECIALTY, § 18.)

Escrow.

86. The delivery, though regularly to the payee, may also be made to a third person as an escrow, a negotiable instrument resembling in the matter of delivery, as in many other respects, a common-law specialty (II. 711, n. 1); but a bill or note, like a bond, cannot be delivered to the payee as an escrow. (II. 99. But see *contra*, II. 99, n. 4, and Bell *v.* Ingestre, I. 287.)

FORMAL REQUISITES OF BILLS AND NOTES — *continued.*

To whom Delivery should be made.

97. It would seem too clear for argument that a note cannot be delivered to a stranger to the note in his own behalf. If, therefore, a note payable to A. is discounted by B., the maker incurs no liability to any one upon the note. (I. 135, n. 1. But see some anomalous decisions *contra*, I. 135, n. 1.)

IRREGULAR OR AMBIGUOUS INSTRUMENTS.

88. An instrument does not lose its character as a note from its containing also a name and address as usually given in the bill, such name and address being either mere surplusage or an indication of the place of payment. (Edis *v.* Bury, I. 136.) It was held, however, in one case, that such an instrument might also be treated, in pleading, as a bill (Lloyd *v.* Oliver, I. 141); but the reasoning of the court in this case is far from convincing, inasmuch as the words "I promise" were wholly ignored.

FRAUD.

Is a personal defense. (DEFENSES, § 5.)

Is no bar to an action, by a purchaser for value without notice. (PURCHASE FOR VALUE, § 4.)

Bars an action by transferee after maturity. (OVERDUE PAPER, § 4.)

Does not prevent legal title passing to a fraudulent transferee. (TRANSFER, § 20.)

Payment to a fraudulent transferee extinguishes the bill. (EXTINGUISHMENT, § 15.)

FRAUDS, STATUTE OF.

Parol promise to pay a check is within. (CHECKS, § 11.)

Obligation of parties to bills is not within. (SPECIALTY, § 19.)

Obligation of irregular indorser is within. (INDORSEMENT, §§ 13, 14.)

Note valid though given for a claim invalid by. (SPECIALTY, § 15 (*f*).)

A bill operates as payment within. (II. 573, n.; Hunter *v.* Wetsell, 17 Hun, 135.)

FUND.

Bills must not be payable out of a particular. (FORMAL REQUISITES, § 6.)

FUNDS.

Absence of, when an excuse for non-presentment. (DILIGENCE DISPENSED WITH, WHEN, § 2.)

G.

GAMING.

Is a real defense. (DEFENSES, § 8 (*b*).)

Is a bar to an action by purchaser for value without notice. (PURCHASE FOR VALUE, § 6.)

GARNISHEE PROCESS. (See TRUSTEE PROCESS.)

GIFT. (See DONATIO MORTIS CAUSA.)

By holder to maker or acceptor extinguishes the bill. (EXTINGUISHMENT, §§ 6, 16.)

Note taken as a, not enforceable against donor. (SPECIALTY, § 17.)

GOLD.
Bill may be payable in. (FORMAL REQUISITES, § 12.)
GOLDSMITH'S NOTE.
When to be presented. (PRESENTMENT FOR PAYMENT, § 5.)
GRACE.
Is allowed on foreign bills (Tassell *v.* Lewis, II. 262; Brown *v.* Harraden, II. 267), on inland bills (Coleman *v.* Sayer, II. 265; Brown *v.* Harraden, II. 268), on promissory notes (Brown *v.* Harraden, II. 267), on each instalment of a note (II. 272, n. 1), on paper payable at or after sight. (Coleman *v.* Sayer, II. 265 and n. 4.)
Is not allowed on paper payable on demand, *e. g.*, bills (II. 266, n. 4), notes (II. 272, n. 1), checks (II. 296, 300), post-dated checks. (Salter *v.* Burt, II. 294, n. 5.)
Presentment must be made on last day of. (PRESENTMENT FOR PAYMENT, § 3.)
Days of, how computed. (PRESENTMENT FOR PAYMENT, § 4.)
GUARANTEE.
Is not a note. (FORMAL REQUISITES, § 6.)
Is not an indorsement. (Belcher *v.* Smith, I. 224, 225, n. 1.)
Is not negotiable. (I. 225, n. 1; Hayden *v.* Weldon, 43 N. J. —.)
Obligation of party to a bill or note is not a, within the statute of frauds. (SPECIALTY, § 19.)
An indorsement without recourse or transfer by delivery is a, of genuineness of bill. (II. 242, n. 1.)
GUARANTOR.
Irregular indorser is not a. (INDORSEMENT, §§ 13, 14.)
Of bill chargeable without presentment and notice. (II. 103, n. 2; II. 112, n. 1.)

H.

HALF-NOTES.
Loss of. (II. 64, 65, n. 10.)
Delay in presentment by transmission of. (PRESENTMENT FOR PAYMENT, § 6.)
HOLIDAYS.
Effect of, upon time of presentment. (PRESENTMENT FOR PAYMENT, § 3.)
Effect of, upon time of notice of dishonor. (NOTICE OF DISHONOR, § 12.)
HONOR. (See ACCEPTANCE FOR HONOR; PAYMENT SUPRA PROTEST.)
HOUR.
Of presentment. (PRESENTMENT FOR PAYMENT, §§ 8–10.)
Of notice. (NOTICE OF DISHONOR, §§ 10, 11.)
HUSBAND AND WIFE. (See COVERTURE.)

I.

ILLEGALITY.
Between prior parties no bar to action against drawer or indorser. (DRAWER AND INDORSER, § 1.)
Is sometimes a real defense (DEFENSES, § 3, *b*), and sometimes a personal defense. (DEFENSES, § 5.)

ILLEGALITY — *continued.*

Is sometimes a bar to an action by purchaser for value without notice (PURCHASE FOR VALUE, § 6), and sometimes not. (PURCHASE FOR VALUE, § 4.)

Always a bar to an action by a transferee after maturity. (OVERDUE PAPER, § 4.)

Note given for a claim void for, may be enforced. (SPECIALTY, § 15 (*e*).)

ILLNESS.

Of holder excuses delay in presentment and notice of dishonor (Byles, Bills, 13th ed., 185, 303; Wilson *v.* Senier, 14 Wis.), but not the illness of holder's wife. (NOTICE OF DISHONOR, § 15.)

INDEMNITY.

On lost or destroyed bill. (ACCEPTOR AND MAKER, § 6.)

INDORSEMENT. (See also DRAWER AND INDORSER; INDORSER WITHOUT RECOURSE.)

ITS NATURE AND EFFECT.

1. A payee (or subsequent holder), instead of holding a bill and collecting it at maturity, may wish to transfer his interest in it to another, in which case he indorses the bill, *i. e.*, he writes and signs upon the back of the bill an order directing its payment to the desired transferee. The order is written with mercantile conciseness, *e. g.*, "Pay A.," signed "X.," the other terms being contained upon the face of the bill. The custom of merchants, however, has attached to this order of the indorser a liability similar to that which attaches to the order of the drawer. By an indorsement, therefore, a party not only passes his interest in a bill to another, but also pledges his credit for the honor of the bill. In other words, an indorsement is at once a transfer and a contract.
2. An indorser may, of course, stipulate for exemption from liability upon his indorsement, as by an indorsement without recourse. (See INDORSER WITHOUT RECOURSE.)
3. In certain other exceptional cases, also, an indorsement operates only as a transfer, *e. g.*: —

An infant may transfer his title in a bill by indorsement (Grey *v.* Cooper, I. 417), but he cannot charge himself with a contract liability. (Williamson *v.* Watts, I. 463.)

A corporation may be prohibited from assuming a contract liability upon negotiable paper, and yet be allowed to transfer its interest therein by indorsement. (Hallifax *v.* Lyle, I. 517; Smith *v.* Johnson, 3 H. & N. 222.)

An indorsement by way of gift passes the title to a bill (Milnes *v.* Dawson, I. 835), but the donor, as the authorities now indicate, assumes no liability to his indorsee. (II. 641, n. 2.)

An indorsement upon Sunday cannot be enforced in jurisdictions in which the Sunday law is in force, but as full effect is commonly given in those jurisdictions to the transfer of other personal property upon Sunday, it would seem that the title to a bill ought also to pass by such an indorsement. (I. 352, n. 3.) The case of Benson *v.* Drake, 55 Me. 555, however, is *contra*. See, also, Knights *v.* Putnam, 3 Pick. 184; Collier *v.* Nevill, 3 Dev. 30; Cowles *v.* McVicker, 3 Wis. 725, and Armstrong *v.* Gibson, 31 Wis. 61, in which cases the title to a bill was held to pass by an indorsement which was not regarded as enforceable as a contract by reason of usury.

INDORSEMENT — *continued.*

DIFFERENT KINDS OF INDORSEMENT.

Special Indorsement.

4. If the holder of a bill writes his order in favor of a specific transferee, *e. g.*, "Pay A. B.," signed "X. Y.," his indorsement is said to be special or in full.

Blank Indorsement.

5. If the holder merely signs his name upon the back of the bill, *e. g.*, "X. Y.," the indorsement is said to be in blank, the signature of the indorser being presumptive evidence of an irrevocable authority to the transferee (or any subsequent holder) to write above the signature an order of payment to himself, or to bearer, or to any one to whom he may wish in turn to transfer the bill; and the blank indorsement when so filled up takes effect by relation from the time of the original delivery by the indorser. An indorsement in blank of a skeleton bill has the same operation. (Russell *v.* Langstaffe, I. 884.)

A blank indorsement, being incomplete, should be filled up before the instrument is offered in evidence at the trial (Day *v.* Lyon, I. 223); but, it must be conceded, the courts do not insist upon this, proceeding upon the unfounded assumption that an indorsement in blank is the same thing as an indorsement to bearer. (I. 223, n. 2.)

Restrictive Indorsement.

6. The term "restrictive indorsement" is commonly, but loosely, applied to two distinct kinds of orders, namely, to an order whereby the holder indorses a bill to one person in trust for another, *e.g.*, "Pay A. for account of B." (Treuttel *v.* Barandon, I. 694); "Pay A. for the use of B." (Evans *v.* Cramlington, I. 705, n. 3); and to an order whereby the holder simply deputes to an agent the business of collecting a bill, *e.g.*, "Pay to A. for my use." (Lloyd *v.* Sigourney, I. 704. See also COLLECTION, AGENCY FOR.)

7. An order of the first kind operates as a transfer of the title of the bill, and commonly also as a pledge of the credit of the indorser, and differs from an ordinary indorsement only in the fact that the indorsee, though the legal holder, is restricted in his mode of dealing with the bill by his duties as trustee. He has, therefore, the power of negotiating the bill further, and his transferee may bring an action against prior parties. (I. 732, n. 2; Evans *v.* Cramlington, I. 705, n. 3.) In Treuttel *v.* Barandon, *supra*, the plaintiff, who was *cestui que trust*, seems clearly to have misconceived his action in bringing trover against his trustee. But the point was not taken.

On the other hand, an order of the second kind does not pass the title of the bill, nor does it impose any obligation upon the principal. The agent, therefore, can neither negotiate the bill nor maintain an action upon it.

8. It was argued at one time that an order which did not contain words of negotiability, *e. g.*, "Pay A. B.," signed "X. Y.," was a restrictive indorsement, depriving the indorsee of the power of negotiating the bill further; but the argument was not successful. (More *v.* Manning, I. 681; Edie *v.* East India Co., I. 682, 685, n. 1; Leavitt *v.* Putnam, I. 784.) Indeed, even if the indorser should expressly restrict the payment to his indorsee, *e. g.*, "Pay A. only," it is believed that the restriction would be

INDORSEMENT — *continued.*

wholly inoperative, as being repugnant to the indorsement itself, which, passing the title, would necessarily invest the transferee with the power of alienation. (Edie *v.* E. J. Co., I. 684, 685. See Power *v.* Finnie, 4 Call, 411.)

"Pay A. or order value in account," is not a restrictive indorsement. (Buckley *v.* Jackson, I. 731. But see Leary *v.* Blanchard, 48 Me. 269.)

Conditional Indorsements.

9. The case of Robertson *v.* Kensington, I. 692, is commonly referred to as an illustration of a conditional indorsement. But it is conceived that the term "conditional indorsement" is an inaccurate one, if it is to be taken as meaning that the title is not to pass until the condition is performed. (See Mitchell *v.* Smith, 4 D. J. & S. 422.)

FORMAL REQUISITES.

An Indorsement must contain an Order.

10. A mere authority to an agent to receive payment is not an indorsement (see *supra*, §§ 6, 7);
nor is an assignment (East *v.* Essington, I. 220, 221, n. 2);
nor a guarantee. (Belcher *v.* Smith, I. 224, 225, n. 1.)

An Indorsement must follow the Tenor of the Bill.

11. An indorsement which varies from the tenor of the bill is not an indorsement according to the custom of merchants, *e.g.*, an order changing the amount of payment (Hawkins *v.* Cardy, I. 219, 220, n. 1);
or time of payment (see Smallwood *v.* Vernon, I. 222); but a bill may be indorsed after maturity, the order being construed as an order to pay on demand. (Colt *v.* Barnard, II. 212.)
A person who is known by several names may indorse in the name of any one of them, although different from the one by which the bill was made payable to him. (Bryant *v.* Eastman, I. 346; Chillicothe Bank *v.* Fox, II. 564, 565, n. 1.)

An Indorsement must be in Writing.

12. An indorsement must be in writing (Moxon *v.* Pulling, I. 226, n. 1);
and upon the bill or note itself, or upon an *allonge* (French *v.* Turner, I 228, 230, n. 1);
but not necessarily upon the back of the instrument. (Young *v.* Glover, I 227, 228, n. 1; see Steele *v.* McKinlay, 5. App. Cas. 754.)

An Indorsement must be by the Legal Holder.

13. No one but a payee or subsequent holder can be an indorser. There is, however, no insurmountable difficulty in charging as indorser within this principle one who writes his name upon the back of a bill or note to give it credit with the payee.
The payee, as holder, may obviously indorse the instrument to the surety without recourse, and may also fill up the blank indorsement of the surety to himself. In this way the parties are placed in the same position as if the maker had in the first instance delivered the note to the payee, the payee had then indorsed it without recourse to the surety, and the surety had then indorsed it to the payee, as in Wilders *v.* Stevens, I. 239, 241, n. 2. Wilkinson *v.* Unwin (App.), 29 W. R. 458; 50 L. J. Q. B. 338, s. c. In both cases the payee as second indorsee charges the surety as second indorser.

INDORSEMENT — *continued.*

This view, by which full effect is given to the intention of the parties, has at length established itself in New York and some other States. (Hall *v.* Newcomb, I. 256; Moore *v.* Cross, I. 264; I. 269, 272, n. 1, § II. (1). See also Hayden *v.* Weldon, 43 N. J. —.)

In many jurisdictions, however, the courts did not see their way to give to this blank signature the effect of a regular indorsement, and accordingly some of them held the anomalous indorser of a note liable as

a guarantor (Boynton *v.* Pierce, I. 267; I. 269, n. 1);

while others, perceiving that as a guarantee this anomalous indorsement would be invalid by the statute of frauds, declared that the indorser of a note was

a joint maker (Union Bank *v.* Willis, I. 249);

and in England it would seem that the anomalous indorser is not liable in any capacity;

not as indorser (Lecaan *v.* Kirkman I. 242);

nor as guarantor (I. 243, *per* Byles, J.; Steele *v.* McKinlay, 5 App. Cas. 754);

nor as maker. (Gwinnell *v.* Herbert, I. 236, 238, n. 3.)

14. The English view, however deplorable in its results, is less open to criticism than the legal reasoning by which the courts first created the arbitrary presumption that one who wrote his name upon the back of a note intended to assume not a secondary but a primary liability, and then, as in Massachusetts, converted this improbable presumption of fact into a conclusive presumption of law. It is not surprising, therefore, to find that the doctrine by which the anomalous indorser is held as a joint maker has been frequently characterized as unsound in principle, and that it has been at last in effect repudiated by statute in the State in which it originated. (Mass. St. 1874, c. 404.)

The main objection to treating the anomalous indorser as a guarantor, aside from the failure to give effect to the intention of the parties, is that a guaranty is not negotiable. (I. 225, n. 2.) Furthermore, such a construction would, in those jurisdictions where by the statute of frauds the consideration for a guaranty must be expressed in writing, make the indorsement a nullity.

For the state of the authorities on this question in the United States, see I. 269, n. 1.

15. The anomalous indorser of a bill should be on the same footing as the indorser of a note, but it has been held that he is liable as a drawer, but not as indorser. (Penny *v.* Innes, I. 233, 235, n. 1; Matthews *v.* Bloxsome, I. 244, overruled by Steele *v.* McKinlay, 5 App. Cas. 754; but see Young *v.* Glover, I. 227; *Ex parte* Yates, DeG. & J. Bank. 137.

An Indorsement is complete only upon Delivery.

16. As a bill is operative against the drawer only from the time of its delivery to the payee, so an indorsement takes effect only from the time of its delivery to the indorsee. (Brind *v.* Hampshire, I. 273, 276, n. 2; Adams *v.* Jones, I. 276; Marston *v.* Allen, I. 279; Buckley *v.* Hann, I. 292.)

17. The delivery must be by the party who writes the indorsement. The delivery by an executor of a bill indorsed but not delivered by the testator, is not an indorsement, but merely the assignment by the executor of a *chose in action.* (Bromage *v.* Lloyd, I. 289, 292, n. 1.)

INDORSEMENT — *continued.*

18. A bill may be delivered by the indorser as an escrow, even to the indorsee (Bell *v.* Ingestre, I. 287; see FORMAL REQUISITES, § 36.)

INDORSER WITHOUT RECOURSE. (See INDORSEMENT, §§ 1, 2; TRANSFEROR BY DELIVERY.)

1. An indorser, as we have seen (INDORSEMENT, §§ 1, 2), may exempt himself from the usual liability to indemnify the holder upon the dishonor of the bill by adding to his indorsement the words "without recourse," or words of equivalent import (Rice *v.* Stearns, II. 197); and as between the immediate parties, it is the better opinion that a collateral agreement that the indorsement shall operate merely as a transfer will have the same effect. (Pike *v.* Street, II. 135, n. 2; see COLLATERAL AGREEMENT, § 5.)

2. But an indorsement without recourse, like a transfer by delivery merely, being, in substance, a sale, the indorser is responsible to the indorsee and subsequent holders for the validity of the title and the genuineness of the instrument which he purports to sell. (Blethen *v.* Lovering, II. 240, 242, n. 1.)

If, however, the instrument was actually signed by the parties whose names it bears, and has not been materially altered before its indorsement without recourse, the indorser, in the absence of fraud, assumes no liability to indemnify the holder, although the paper may be subject to defenses in favor of prior parties. (Littauer *v.* Goldman, 72 N. Y. 506; Otis *v.* Cullum, 92 U. S. 447; but there are numerous authorities *contra*, II. 242, n. 1, last paragraph.)

INDULGENCE. (See SURETY.)

INFANCY.

Of prior party is no bar to action against drawer or indorser. (DRAWER AND INDORSER, § 1.)

Is a real defense, even though the bill be given for necessaries (DEFENSES, § 3 (*a*)) — and bars an action by a purchaser for value without notice. (PURCHASE FOR VALUE, § 6.)

Bill executed before, may be ratified after. (I. 463, n. 1.)

Infant may transfer legal title. (TRANSFER, § 18; INDORSEMENT, § 3.)

INITIALS.

Signature may be by. (I. 145.)

INJUNCTION.

As the basis of equitable defenses. (DEFENSES, § 4.)

INLAND BILL.

Grace is allowed on. (GRACE.)

Need not be presented by a notary. (PRESENTMENT FOR PAYMENT, § 16.)

INSANITY.

Is a real defense. (DEFENSES, § 3, *a.*)

Bars action by a purchaser for value without notice. (PURCHASE FOR VALUE, § 6.)

Prevents transfer of legal title. (PURCHASE FOR VALUE, § 2 (*e.*).)

INSOLVENCY.

Is no excuse for non-presentment. (DILIGENCE DISPENSED WITH, WHEN, § 16.)

INSTALMENTS.
Note payable in is negotiable. (FORMAL REQUISITES, § 20.)
Note payable in, when dishonored. (OVERDUE PAPER, § 10.)
Grace allowed on each instalment. (GRACE.)
INTEREST.
Begins to run, when. (See ACCEPTOR AND MAKER, § 10; DRAWER AND INDORSER, § 11.)
Default in payment of, is not a dishonor of paper. (OVERDUE PAPER, § 10.)
Rate of interest. (CONFLICT OF LAWS, § 3; DRAWER AND INDORSER, § 11.)
Alteration in rate of, is material. (I. 448, n.)
INTOXICATION.
Is a real defense. (DEFENSES, 3 (*a*).)
Bars action by holder for value without notice. (PURCHASE FOR VALUE, § 6.)
Prevents transfer of the legal title. (PURCHASE FOR VALUE, § 2 (*e*).)
I. O. U.
Not a note. (FORMAL REQUISITES, § 5.)
IRREGULAR INDORSEMENT.
Nature of the obligation. (INDORSEMENT, §§ 13–15.)
Payment to irregular indorser may extinguish a note. (EXTINGUISHMENT, § 7.)
IRREGULAR INSTRUMENT. (FORMAL REQUISITES, § 38.)

J.

JOINT AND SEVERAL NOTES.
What are. (II. 557, n.)
JOINT DRAWERS OR INDORSERS.
Contribution between. (SPECIALTY, § 15 (*h*).)
Whether notice of dishonor should be given to all. (NOTICE OF DISHONOR, §§ 31–33.)
When indorsement must be joint. (TRANSFER, § 14.)
JOINT MAKERS OR DRAWEES.
Whether presentment should be made to all. (PRESENTMENT FOR ACCEPTANCE, §§ 6, 7; PRESENTMENT FOR PAYMENT, §§ 18, 19.)
Discharged as sureties, when. (See SURETY.)
Irregular indorser not properly a joint maker. (INDORSEMENT, §§ 13–15.)
JOINT STOCK COMPANY.
Notice to member of, is not notice to company. (NOTICE OF DISHONOR, § 32.)
JUDGMENT.
Whether an extinguishment of a bill. (Woodward *v.* Pell, I. 857, 861, n. 1.)
JURISDICTION. (See CONFLICT OF LAWS.)

K.

KNOWLEDGE.
Equal to notice, when. (DILIGENCE DISPENSED WITH, WHEN. § 14.)

L.

LARCENY.
A bill is the subject of. (CHATTELS, § 3.)
LEGAL TENDER. (See TENDER.)
LETTERS OF CREDIT. (See II. 783.)
LIEN.
Is not waived by taking a bill in conditional payment of a debt. (II. 572, n.)
LIMITATION.
Statute of, begins to run on bills and notes, when. (ACCEPTOR AND MAKER, § 11; DRAWER AND INDORSER, § 6; Woodruff *v.* Moore, II. 88, 785, n.)
Statute of, begins to run on a check drawn without funds from the time of issue. (Brush *v.* Barrett, 82 N. Y. 400.)
A note is valid though given for a claim barred by. (SPECIALTY, § 15 (*c*).)
LIS PENDENS.
Doctrine of, inapplicable to bills. (PURCHASE FOR VALUE, § 20.)
LORD'S ACT.
When not a bar to action by drawer against acceptor. (ACCEPTOR, § 1.)
LOST OR DESTROYED BILL.
No action at law upon. (ACCEPTOR AND MAKER, § 6; DRAWER AND INDORSER, § 5.)
Nor upon claim for which it was given. (SPECIALTY, § 11.)
Remedy in equity in case of. (ACCEPTOR AND MAKER, § 6.)
Indemnity required in case of. (ACCEPTOR AND MAKER, § 6.)
Due diligence necessary to charge drawer and indorser of. (DILIGENCE DISPENSED WITH, WHEN, § 16; PRESENTMENT FOR PAYMENT, § 23.)
Right of holder, in case of loss of a half-note. (II. 65, n. 10.)
Voluntary destruction of a bill extinguishes it. (II. 65, n. 10.)
Mode of pleading in an action upon. (ACCEPTOR AND MAKER, § 11.)
LUNATIC. (See INSANITY.)

M.

MAIL.
Presentment by. (PRESENTMENT FOR PAYMENT, § 25.)
Notice by. (NOTICE OF DISHONOR, §§ 41–44.)
Miscarriage of, excuses delay in presentment. (PRESENTMENT FOR PAYMENT, § 6.)
MAKER.
Liability of. (See ACCEPTOR AND MAKER.)
Ostensible acceptor, when liable as. (FORMAL REQUISITES, §§ 4, 25, 26.)
Ostensible drawer, when liable as. (FORMAL REQUISITES, §§ 4, 25, 26.)
Irregular indorser, when liable as. (INDORSEMENT, §§ 13–15.)
MARK.
Signature may be by a. (I. 145.)
MARRIED WOMEN. (See COVERTURE.)
MATERIAL REQUISITES. (I. 145.)
MEMORANDUM. (See COLLATERAL AGREEMENT, § 1.)
MEMORANDUM CHECK. (See II. 730, n.)

MERGER. (See SPECIALTY, §§ 6–13.)
MESSENGER. (See NOTICE OF DISHONOR, § 38.)
MISTAKE OF FACT. (See MONEY HAD AND RECEIVED.)
MONEY.
Bill must be payable in. (FORMAL REQUISITES, §§ 11–13.)
What is. (FORMAL REQUISITES, §§ 11–13.)
Agent can receive payment in nothing but. (II. 571, n. 1.)
MONEY COUNTS.
A bill will not support an action upon. (SPECIALTY, § 4.)
MONEY HAD AND RECEIVED. (See MONEY COUNTS.)
Count for lies, when the holder of a paid bill refuses to surrender it. (ACCEPTOR AND MAKER, § 5.)
By party who has paid a bill to a wrongful holder. (I. 433, n. 2; I. 591, n. 1.)
MONEY PAID.
Whether one who has taken up a bill can maintain a count for, against a prior party. (II. 785, n.)
MONTHS.
In bills, are calendar months. (PRESENTMENT FOR PAYMENT, § 4.)
How reckoned. (PRESENTMENT FOR PAYMENT, § 4.)
MUNICIPAL BONDS. (See NEGOTIABLE PAPER.)

N.

NAME.
Mode of indorsement, by a person having more than one. (INDORSEMENT, § 11.)
Effect of making a bill payable to one by a wrong. (I. 347, n. 1.)
"NEED, IN."
Meaning of, in an indorsement. (*Re* Leeds Banking Co., L. R. 1 Eq. 1; Leonard *v.* Wilson, 4 Tyrwh. 415.)
NEGLIGENCE.
Estoppel by. (PURCHASE FOR VALUE, § 3.)
NEGOTIABILITY.
Bill not negotiable without words of. (TRANSFER, § 5.)
Words of, not essential to non-negotiable bill. (I. 77, n. 5; CHECKS, § 1.)
What are words of. (TRANSFER, §§ 3, 5.)
By what law determined. (CONFLICT OF LAWS, § 2.)
NEGOTIABLE BILLS AND NOTES.
What are. (TRANSFER, §§ 1–5.)
NEGOTIABLE PAPER, OTHER THAN BILLS AND NOTES.
1. Besides bills, notes, and checks, certain other obligations have acquired, by force of mercantile custom, the qualities of negotiable paper, *e. g.*,—
Exchequer bills. (II. 749, n. 2.)
State, municipal, and other corporate bonds. (Gorgier *v.* Mieville, II. 748; *In re* General Estates Co., II. 749, 753, n. 1; White *v.* Vermont R R., II. 772, 774, n. 5.)
Coupon bonds of an individual. (II. 775, n. 5.)

NEGOTIABLE PAPER — *continued.*
Coupons. (Everton *v.* National Bank, II. 775, 780, n. 2.) Interest upon coupons is therefore not compound interest. (Burton *v.* Koshkonong, 4 Fed. Rep. 373.)
Government scrip. (Goodwin *v.* Robarts, II. 753.)
Post-office orders. (II. 769, n. 1.)
2. On the other hand, negotiability does not attach to a common contract under seal. (Clarke *v.* Farmer's Co., II. 770, 771, n. 3.)
Nor lottery tickets, district warrants, iron scrip notes, or debentures. (II. 769, n. 1.)
See as to bills of lading, letters of credit, warehouse receipts, certificates of stock, II. 782–784.

NOTARIAL EXPENSES.
Liability of acceptor and maker for. (ACCEPTOR AND MAKER, § 16.)
Liability of drawer and indorser for. (DRAWER AND INDORSER, § 10.)

NOTARY. (See PROTEST; DRAWER AND INDORSER, § 3.)

NOTICE.
Purchaser for value affected with, when. (PURCHASE FOR VALUE, §§ 10–20.)
Whether a note may be made payable after. (FORMAL REQUISITES, § 9.)
Of indorsement not necessary. (ACCEPTOR AND MAKER, § 14.)

NOTICE OF DISHONOR.
NECESSITY OF NOTICE.
1. A drawer, or indorser, or payor *supra* protest, is not chargeable without notice. (DRAWER AND INDORSER, §§ 2–4; PAYMENT SUPRA PROTEST.) But a drawer or indorser who has not received notice of dishonor by non-acceptance, is nevertheless liable to a purchaser for value, who gives due notice of a subsequent dishonor by non-payment. (Dunn *v.* O'Keefe, I. 468; PURCHASE FOR VALUE, § 5.)
Notice need not be given to the drawer to charge an indorser. (DRAWER AND INDORSER, § 4.)
The acceptor of a bill, or the maker of a note, payable at a bank, is liable without notice. (Pearse *v.* Pemberthy, II. 12; CHECKS, § 12.)
WHAT THE NOTICE MUST CONTAIN.
2 There are three formal requisites to a valid notice of dishonor: (1) A fair description of the dishonored bill or note. (2) An intimation of the fact of dishonor. (3) Either the name of the person who gives the notice, or the name of the person by whose authority it is given.
Description of the Bill or Note.
3. The description must fairly identify the bill or note to the mind of the party notified. An incomplete description, or even a misdescription, by which the defendant could not reasonably be misled, is sufficient. (Mellersh *v.* Rippen, II. 376, 377, n. 2.)
Intimation of the Fact of Dishonor.
4. It was once thought that a notice must, "in express terms or by necessary implication," convey information of the fact of dishonor. (Solarte *v.* Palmer, II. 364.)
But this rule has been very justly qualified, and a notice is now sufficient, "if it appear by reasonable intendment, and would be inferred by any

NOTICE OF DISHONOR — *continued.*

man of business" that the bill or note had been dishonored. (Hedger *v.* Steavenson, II. 368, 371, n. 1; Paul *v.* Joel, II. 379.)

Accordingly, a notice that a bill is due and unpaid is sufficient, without stating that it was presented for payment. (Paul *v.* Joel, II. 378.)

So a misstatement as to the time of presentment of a bill which was in fact duly presented will not vitiate the notice, if the party to be charged could not fairly be misled. (II. 365, n. 3.)

Sender of the Notice.

5. A written notice without signature is not sufficient. (II. 367, n. 1.)

But the signature of a holder for collection is enough. (Woodthorpe *v.* Lawes, II. 366; Harrison *v.* Ruscoe, II. 375.)

A notice in the name of a mere holder for collection is good, without stating the name of the party in whose behalf the collection is to be made, or where the bill is lying. (Woodthorpe *v.* Lawes, II. 366; Housego *v.* Cowne, II. 432.)

So also a notice in the name of an agent for collection, who is not even a holder, is good, without the name of his principal. (Harrison *v.* Ruscoe, II. 375, *semble.*)

But if the agent, intending to give the name of his principal, by mistake gives the name of another person, the notice will, for the purpose of determining his principal's rights against the party notified, be treated as emanating from the ostensible principal. Accordingly, if a notice given under the same circumstances by the ostensible principal would be sufficient to charge the party notified in favor of the real principal, the agent's mistake will be immaterial; but if a notice by the ostensible principal, under the same circumstances, would not enure to the benefit of the real principal, the agent's mistake would be fatal. (Harrison *v.* Ruscoe, II. 373.)

6. The notice need not, in express terms, inform the party to be charged that he is looked to for payment. The mere fact of sending notice, it is said, is a sufficient intimation of this fact. (King *v.* Bickley, II. 372; Caunt *v.* Thompson, II. 487; Allen *v.* Edmundson, II. 483.)

The notice need not state where the bill or note is lying. (Woodthorpe *v.* Lawes, II. 366.)

Nor the fact of protest in the case of a foreign bill. (II. 452, n. 1.)

And need not be accompanied by a copy of the protest. (Goodman *v.* Harvey, I. 709; Cromwell *v.* Hynson, II. 115; Dennistoun *v.* Stewart, II. 452.)

TIME OF SERVING NOTICE.

When Notice may be given.

7. The holder may give notice on the day of presentment immediately after a refusal to accept or pay. (*Ex parte* Moline, II. 422 and n. 1; Burbridge *v.* Manners, I. 465.)

8. A prior party may give notice as soon as he himself has been notified of the dishonor. It has been held also that a party may send notice even before he himself has been notified, if the bill or note has been in fact dishonored. (II. 421, n. 4.)

When Notice must be given.

9. Notice must be given the next day after that on which the party notifying is in a position to give it, that is to say, if the party notifying is the

NOTICE OF DISHONOR — *continued.*

last holder, on the next day after the day of dishonor, or, if a prior party gives the notice, on the next day after that on which he himself has been notified, *e. g.*, —

10. When the parties reside in the same town or village, and the notice is given by delivery at the house or place of business of the party to be charged, or to him in person, it should be delivered on the next day (Rowe *v.* Tipper, II. 387; Blackman *v.* Leonard, 15 La. An. 59); or

If the penny post is used, the notice should be mailed in time to reach the party to be charged by one of the usual deliveries of the carrier on the next day. (Smith *v.* Mullett, II. 380, 381, n. 1.)

11. When the parties do not reside in the same town or village, if the service is by mail, and the post-office is used as a medium of transmission, the notice should be mailed in season to go by some post of the next day (Wright *v.* Shawcross, II. 382 and n. 1; Howard *v.* Ives, II. 390, 391, n. 4); or in case there is no post on the next day, or if the only post of that day leaves before the beginning of business hours, the notice should be mailed in time to go by the next succeeding post. (Geill *v.* Jeremy, II. 384, 385, n. 1.)

In cases where the post-office may be used as a place of deposit, the notice must be deposited on the next day in time to be taken from the office on that day. (*Infra*, §§ 42, 43; Shelburne Falls Bank *v.* Townsley, 102 Mass. 177.)

If the service is not by mail, the notice must be despatched on the next day, and the transmission must be equally expeditious with the post; or if there is no mail communication, the transmission must be as rapid as is practicable by the ordinary modes of conveyance. (Fish *v.* Jackman, 19 Me. 467; Darbishire *v.* Parker, 6 East, 3.)

Holidays.

12. If the next day is a holiday, it is entirely excluded in determining the proper day for giving notice. (II. 391, n. 3.)

Similarly, if the party notifying receives notice on a holiday, he is, in legal contemplation, considered as receiving it on the next business day. (Wright *v.* Shawcross, II. 382; Bray *v.* Hadwen, 5 M. & Sel. 68. Farmer *v.* Rand, 16 Me. 453, *contra*, is not to be supported.)

Excusable Delay.

13. If the party notifying is ignorant of the residence or place of business of the party to be charged, a delay is excusable, provided reasonable diligence is used to ascertain the place where the notice should be given, and notice is given or forwarded on the day after the place is ascertained (Gladwell *v.* Turner, II. 387, 389, n. 2.)

14. If commercial intercourse between the places of the parties is interrupted or impracticable, as in the event of a war, or the prevalence of a malignant disease, a delay until the renewal of intercourse is excusable. (James *v.* Wade, II. 394 and n. 1.)

Inexcusable Delay.

15. But merely personal inconvenience of the party notifying, *e. g.*, the illness of his wife, will not excuse a delay. (Turner *v.* Leach, II. 381.)

16. A delay beyond the usual time is inexcusable also, even though the notice is sent immediately after the party notifying received actual knowledge of the dishonor, if his ignorance was attributable to his own neglect, as

NOTICE OF DISHONOR — *continued.*
when he failed to open and read the notice which he received in due time (Turner *v.* Leech, II. 383.)

Successive Notices.

17. As each indorsee or transferee is entitled to his day, according to the rules just stated, and as a due notice given by any party competent to give notice enures to the benefit of all the other parties to the bill (*infra*, §§ 26–29), it follows that the time within which a party can be charged by a notice given to him may be greatly extended, *e. g.*, if there were fifteen indorsers of a bill, and each indorsee should duly notify only his immediate indorser, the time within which the first indorsee might be charged would be measured by the time required for the due forwarding of the fifteen successive notices; whereas, if the fifteenth indorsee should give direct notice to the first indorser, the time within which the latter could be charged would expire with the next day after the day of dishonor. (Rowe *v.* Tipper, II. 385; Fitchburg Bank *v.* Perley, II. 392.)

But if any one of the intermediate parties should be guilty of laches in giving his notice, all prior parties entitled to notice would be thereby discharged, *e. g.*, if in the case just supposed the twelfth indorsee should fail duly to notify his indorser, the latter could not charge the eighth indorser, even though the eighth indorser was afterwards notified as soon as he would have been if each successive notice had been duly given. (Turner *v.* Leech, II. 383.)

18. A holder for collection merely is an indorsee or transferee within the rule that every indorsee or transferee has a day for giving notice. (Howard *v.* Ives, II. 390; Scott *v.* Lifford, II. 431.)

So also each branch of a bank through which a bill or note passes. (II. 390, n. 1.)

An agent who is not a party to the bill, it has been held, is not entitled to a day for giving notice to his principal. (II. 393, n. 1.)

One who takes up a bill for honor, being in effect the indorsee of the party for whose honor he pays it, is of course entitled to his day. (Goodall *v.* Polhill, 1 C. B. 233; II. 389, n. 2.)

Hour of Service.

19. If the service is made on the last of the days during which a valid notice may be given, and by delivery at the place of business or residence of the party to be charged, or to him in person, the notice must be delivered at a reasonable hour, that is to say, during business hours, if at one's place of business, or before the hours of rest, if at one's dwelling-house. (II. 389, n. 2.)

But a notice delivered at an unseasonable hour will be sufficient if actually received by the party to be charged on the proper day. (II. 389, n. 2.)

In cases where the post-office may be properly used as a place of deposit merely, the notice should be deposited before the close of the hours during which letters can be taken from the office on the last of the days during which a valid notice may be given. (Shelburn Bank *v.* Townsley, 102 Mass. 177.)

PLACE OF SERVING NOTICE.

Service not by Mail.

20. If the notice is not served by mail, it must be given either at the residence or place of business of the party notified, or to him in person wherever

NOTICE OF DISHONOR — *continued.*

found, the choice of place resting in the option of the party notifying. (II. 440, n. 4; Bank of Columbia *v.* Lawrence, II. 434, RESIDENCE; II. 398, n. 6, PLACE OF BUSINESS.)

Service by the Penny-post.

21. If the notice is served by mail within the circuit of the penny-post, it must be addressed to the party to be charged either at his residence or place of business (or, if not so addressed, must be actually delivered by the carrier at his residence or place of business, or to him in person), the choice of the place of address resting within the option of the party notifying. (Berridge *v.* Fitzgerald, II. 396, 398, n. 6.)

Residence or Place of Business.

22. Not only the actual place of business of the party to be charged, but any place which he holds out as the place where he is likely to be found for the purpose of receiving notice, may be treated as his place of business within the rule above stated. (Berridge *v.* Fitzgerald, II. 396.)

One's place of residence within the rule above stated is not necessarily the same as one's place of domicile. If the party to be charged actually resides at more than one place during certain portions of the year, a notice addressed to him at the place of his actual residence at the time of service is sufficient, *e. g.*, a notice addressed to a senator at Washington while the Senate is in session. (Chouteau *v.* Webster, II. 402, 405, n. 3.)

A notice addressed to a party at his domicile during the period of his actual residence elsewhere would probably be sufficient to charge him, but the point seems not to have been determined.

Service by Mail between different Places.

23. If the service is by mail between different places, it is enough to mail the notice addressed generally to the party to be charged at either the town where he resides or the town where he has his place of business, the choice of the town lying within the option of the party sending the notice. (Morton *v.* Westcott, II. 409, 410, n. 1; Bank of Columbia *v.* Lawrence, II. 434; Van Vechten *v.* Pruyn, II. 441.)

The rule is not changed by the simple fact that there are several offices in the town. But if it appears that the party to be charged was in the habit of receiving his letters at one office only, and that the party sending the notice knew of the existence of two or more offices in the town, and also knew, or might by reasonable inquiry have known, that the party to be charged received his letters at a particular office only, the notice will be insufficient unless sent to that office. (Morton *v.* Westcott, II. 409, 411, n. 1 and 2.)

In one class of cases, namely, where the party to be charged is in the habit of receiving his letters in a town where he neither resides nor does business, the party notifying has a greater option than that indicated by the rule above stated, for he may then send notice to the place where the party to be charged receives his letters, to the town where he resides, or to the town where he does business. (Chouteau *v.* Webster, II. 405; Remer *v.* Downer, 23 Wend. 620, 622; Hunt *v.* Fish, 4 Barb. 324.)

If the town where the party to be charged has his place of business, or if the town where he resides contains no post-office, notice should be sent to the post-office nearest to his residence or place of business (unless the nearest post-office is so far from his residence or place of business as

NOTICE OF DISHONOR — *continued.*

to render service by a private conveyance necessary, see *infra*, § 37); if, however, he is in the habit of receiving his letters at a post-office which is not the nearest to his residence or place of business, and this fact is known to the party notifying, the notice should be sent to the more remote post-office. (Mercer *v.* Lancaster, II. 405, 407, n. 1; Bank of Columbia *v.* Lawrence, II. 435.) In cases like the last supposed, it has been thought that notice might properly be sent either to the nearest or to the more remote post-office. (Mercer *v.* Lancaster, II. 407.)

When Notice sent to a wrong Place is sufficient.

24. If after the transfer of a bill or note to the party notifying, and without his knowledge, the party to be charged changes his place of residence or business, a notice sent to the former place of residence or business is sufficient. (Bank of Utica *v.* Phillips, II. 401, 402, n. 1.)

If the party notifying is ignorant of the place of residence or business of the party to be charged, he must make all reasonable efforts to inform himself, and if, after diligent inquiry, he acts upon the information received, due notice is given, even though actually sent to a place where the party to be charged neither resides nor does business (Rawdon *v.* Redfield, II. 407, 408, n. 3), and the subsequent discovery of the true address of the party to be charged will not impose the duty of sending a second notice (*infra*, § 35); but see Beale *v.* Parrish, II. 411, *semble contra*, in which case it was further decided that a notice sent, after due inquiry by the holder, to the wrong place, although sufficient for him to charge the defendant, would not enure to the benefit of an intermediate party who knew the true address.

If a drawer or indorser dates his bill or indorsement at a particular place a notice addressed to either at that place is sufficient; even though the drawer or indorser actually neither resides nor does business at the place named. (Burmester *v.* Barron, 17 Q. B. 828, cited II. 399, n. 1.)

If a notice given at, or sent to, a wrong place, is actually received in due time, it is sufficient. (II. 404, n. 1.)

Address.

25. The address must not be too general. A notice sent to a large city, and addressed to the party to be charged by his surname only, *e. g.*, "Mr. Haynes, Bristol," is insufficient. (Walter *v.* Haynes, II. 395 and n. 1.)

But if the party to be charged has added to his signature the name of a place, it is enough, in addressing the notice, to follow the signature and name given. (Mann *v.* Moors, II. 396 and n. 1.)

BY WHOM NOTICE SHOULD BE SERVED.

Notice by last Holder or any prior Holder liable to take up the Bill.

23 Notice may be given by the last holder, or by any prior holder who may be legally liable to take up the bill or note, and the notice will enure to the benefit of all parties subsequent to the parties so notified. (See, however, *supra*, § 24, for a possible qualification of this rule.)

Accordingly, notice may be given by a party before he has himself taken up the bill or note from the last holder. (Chapman *v.* Keane, II. 418.)

And a notice given, for instance, by the fourth indorser to the second, will fix the liability of the second to both the fourth and third indorsers. (Jameson *v.* Swinton, II. 417 and n. 3.)

Or a notice given by the third to the second indorser will fix the liability of

NOTICE OF DISHONOR — *continued.*

the second to both the third and fourth indorsers. (Harrison *v.* Ruscoe, II. 374; Chapman *v.* Keane, II. 421.)

But a notice sent by a party who cannot legally be called upon to take up the bill or note, *e. g.*, by one who has been discharged by laches or by one who has indorsed without recourse, is a nullity. (Turner *v.* Leach, II. 381; Harrison *v.* Ruscoe, II. 374.)

Notice by a Drawee or Maker.

27. A drawee or maker, not being a holder, cannot give a valid notice. (Harrison *v.* Ruscoe, II. 374, 375, overruling Rosher *v.* Kieran, II. 418.)

Notice by an Agent.

28. Notice may, of course, be given by the duly authorized agent of any party who might himself give notice. (Stewart *v.* Kennett, II. 416, n. 1; Chapman *v.* Keane, II. 418; Harrison *v.* Ruscoe, II. 375.)

Notice by a Stranger.

29. But a notice by a mere stranger is a nullity. (Stewart *v.* Kennett, II. 416, 417, n. 1; Caunt *v.* Thompson, II. 487.)

TO WHOM NOTICE SHOULD BE GIVEN.

Notice to an Agent.

30. Notice may be given to the agent of the party to be charged if the receipt of notice is within the scope of the agent's authority. (II. 425, n. 3.)

Notice to Joint Drawers or Indorsers.

31. In order to charge any one of several joint drawers or joint indorsers, not being partners, notice must be given to them all. (Willis *v.* Green, II. 424, 425, n. 2.)

Notice to a Partnership.

32. If, however, a bill is drawn or indorsed by a partnership, notice to any one of the partners is sufficient. (Willis *v.* Green, II. 425, n. 3.)

But notice to a private member of a joint stock company would not be sufficient to charge the company. (Byles, Bills, 13th ed. 295, citing *In re* Carew, 31 Beav. 39.)

It was held in one case also that a notice to a partner residing in a distant town would not be sufficient to charge the firm if any one of the partners resided in the same town with the party notifying. (Hume *v.* Watt, 5 Kas. 34. See also *infra*, § 37.)

Notice to Executors.

33. A notice given to any one of the executors of a drawer or indorser is sufficient. (II. 425, n. 3.)

But if several executors jointly draw a bill, or indorse a bill or note payable to them, notice must be given to them all. (Conf. I. 391, n. 1.)

When the Drawer or Indorser is a Bankrupt.

34. If notice is given before the appointment of an assignee it should be given to the bankrupt, and no notice need be given to an assignee subsequently appointed. (*Ex parte* Moline, II. 422, 423, n. 1.)

If notice is given after the appointment of an assignee, it may be given either to the assignee or to the bankrupt, at the option of the party notifying. (*Ex parte* Moline, II. 422, 423, n. 1.)

When the Drawer or Indorser is Dead.

35 If the death of the drawer or indorser is unknown to the party notifying, a notice duly sent to either as if he were still living is sufficient. (II. 428, n. 1.)

NOTICE OF DISHONOR — *continued.*

So also, although the death is known, if the party died intestate, and there is no administrator at the time of notice, the notice should be sent to the last residence or place of business of the deceased. (Merchants' Bank *v.* Birch, II. 426, 428, n. 1. But see II. 438, n. 2.)

In neither of the cases last supposed need the party notifying send a second notice although he learns subsequently of the appointment of a legal representative of the deceased. (Merchants' Bank *v.* Birch, II. 427, 428. See *supra*, § 24.)

If the deceased left a will, and it is necessary to send notice before the party named in the will has either been duly qualified or renounced his trust, notice may be sent either to the party named as executor or to the last residence or place of business of the deceased. (II. 430, n. 1.)

But notice to one who is subsequently appointed administrator is a nullity. (II. 430, n. 1.)

If at the time for giving notice there is a duly qualified executor or administrator of the deceased, and the existence of such legal representative is known, or might by diligent inquiry be ascertained, by the party notifying, the estate of the deceased can be charged only by a notice sent to the executor or administrator. (Massachusetts Bank *v.* Oliver, II. 428, 430, n. 1.)

The Notice may be written or oral.

86. A notice may be oral as well as written or printed, and may be given, in the absence of the party to be charged, to any one at his dwelling-house or place of business fit to repeat the message to him. (Housego *v.* Cowne, II. 432 and n. 2; Allen *v.* Edmundson, II. 484.)

A written notice may be served in two modes: (1) by actual delivery, (2) by mere deposit in the post-office.

Service by Delivery, when required.

87. When the party to be charged resides or does business in the same town or village where the party giving notice has himself been notified, or in the town where the bill or note was dishonored, if the party giving notice is the last holder, and the post-office is not available as a medium of transmission, as where there is no penny-post, the service must be by actual delivery; that is to say, the notice must be given to the party to be charged, in person, wherever found, or must be left either at his dwelling-house or place of business. (Sheldon *v.* Benham, II. 437, 438, n. 2.)

This rule holds, even though the party to be charged may also have a place of business or residence in another town. The delivery in this case, it is true, may be made in either town, as the party notifying may elect; but there is no option as to the mode of service. (Van Vechten *v.* Pruyn, II. 438; see also *supra*, § 32.)

When the party to be charged resides or does business in a distant town, and there is no post-office in or reasonably near the town, it has been held that the service must also be by delivery. (Bank of Columbia *v.* Lawrence, II. 435, *semble;* Fish *v.* Jackman, 19 Me. 467.)

So when the ordinary mail service is suspended, the service must be made by delivery, if practicable. (II. 443, n. 1.)

Service by Delivery, when permissible.

88. Service by delivery is always permissible, even in cases where service through the post-office would be proper. But the transmission by messen-

NOTICE OF DISHONOR — *continued.*

ger must be as expeditious as it would be by mail, and any expense in excess of the regular postage would have to be borne by the party sending the notice. (Bank of Columbia *v.* Lawrence, II. 436, n. 2.)

What amounts to a Delivery.

39. A notice is delivered if it is left at the dwelling-house or place of business of the party to be charged, whether he be there or not. (Housego *v.* Cowne, II. 432; Van Vechten *v.* Pruyn, II. 440; Allen *v.* Edmundson, II. 484.)

But a notice left with an employee, at the defendant's place of business, while the defendant is away, with instructions not to open the letter until his employer returned, was held insufficient. (Paine *v.* Edsell, 19 Pa., 178.)

40. Delivery to the person is good wherever made, *e. g.*, at the wrong house. (II. 404, n. 1.)

So also the actual receipt of a notice in due time is equivalent to a delivery, even in case where service by a mere deposit in the post-office would be insufficient. (II. 438, n. 2.)

Service through the Post-office as a Medium of Transmission.

41. Except in the cases mentioned, *supra*, § 37, where the actual delivery of the notice is required, service may be always made through the post-office; *e. g.*, when the post-office is used as a medium of transmission

Between different towns. (Shaylor *v.* Mix, II. 443, n. 1.)

Or between different villages of the same town. (Shaylor *v.* Mix, II. 442, 443, n. 2; Van Vechten *v.* Pruyn, II. 440.)

Or in the same city or town within the circuit of the penny-post. (Scott *v.* Lifford, II. 431; Bank of Columbia *v.* Lawrence, II. 434.)

Service through the Post-office as a Place of Deposit merely.

42. The post-office may be used as a place of deposit merely, if the party to be charged is in the habit of receiving his letters at the office of deposit, and if a service by delivery would subject the party giving notice to the burden of going or sending a messenger beyond the corporate limits of his own town. (Bank of Columbia *v.* Lawrence, II. 433, 436, n. 3. But see Forbes *v.* Omaha Bank, 8 Neb. 338, *contra.*)

But if it is possible to use the post-office as a medium of transmission between the towns of the parties, it is not allowable to use it also as a place of deposit, even though the party to be charged is in the habit of receiving his letters at the post-office in both towns. (Shelburne Falls Bank *v.* Townsley, II. 447, citing s. c. 102 Mass. 177.)

The post-office may also be used as a place of deposit if the indorser has so directed in his indorsement. (II. 438, n. 2.)

Notice to several Indorsers.

43. It frequently happens that a holder sends, with the notice to his immediate indorser, notices addressed to prior parties in the same town, and the prior parties may be charged upon these notices, if duly served, as emanating either from the holder or from the immediate indorser. If treated as independent notices from the immediate indorser, they are governed by the same rules as to the time and mode of service which would apply to original notices from him; but if treated as coming from the original holder, they may be redeposited in the post-office as a place of deposit, provided the notice was redeposited in season to reach the prior parties substan-

NOTICE OF DISHONOR — *continued.*

tially as soon as they would have been received if originally directed to them. (Shelburne Falls Bank *v.* Townsley, II. 444, 447, n. 2.) The party who encloses the notices to his indorser takes the risk of their miscarriage (II. 448, n. 1.)

Service by Mail, when complete.

44. The service by deposit in the post-office is complete as soon as the notice, properly addressed, is placed within the control of the post-office authorities, *e. g.*, as soon as given to a carrier, or placed in a letter-box, whether the notice reaches the party to be charged or not. (Saunderson *v.* Judge, II. 354, 355, n. 2; Walter *v.* Haynes, II. 395; Bank of Columbia *v.* Lawrence, II. 434, 435.)

NOTING.

Must be on the day of dishonor. (II. 449.)

O.

ORDER.

A bill must contain an. (FORMAL REQUISITES, §§ 1–3.)

"OR ORDER."

Bill payable to order of A. is the same as a bill payable to A. or order. (FORMAL REQUISITES, § 31.)

Not essential to an indorsement. (INDORSEMENT, § 18; OVERDUE PAPER, § 2.)

OVERDUE OR DISHONORED PAPER.

ASSIGNABILITY.

1. The career of a bill properly ends with its payment, or dishonor at maturity. If paid, it is *functus officio;* if dishonored, it can no longer adequately perform its function as a representative of money, but is transformed into an ordinary *chose in action*. But by an anomaly, bills and notes, although overdue, are assignable, and that too even after action brought. (Deuters *v.* Townsend, I. 777, 781, n. 3.)

MODE OF ASSIGNMENT.

2. Overdue bills are assigned in the same mode as bills not yet due, *i. e.*, by indorsement and delivery, an indorsement being treated as an order to pay on demand. (Colt *v.* Barnard, II. 212.)

And not requiring words of negotiability. (Leavitt *v.* Putnam, I. 784.)

EFFECT OF ASSIGNMENT.

3. An overdue bill being no more than an assignable *chose in action*, if the transferor has no title, his transferee can acquire none. (Ashurst *v.* Royal Bank, I. 773; I. 747, 748, n. 1.)

4. And, for the same reason, the transferee of one who holds the legal title takes the bill subject to all personal defenses to which it was subject in the hands of his transferor, *e. g.*, fraud, illegality, duress, failure of consideration, premature payment, satisfaction, collateral agreements, and the like. (Brown *v.* Davies, I. 745, 747, n. 1; Holmes *v.* Kidd, I. 775.)

5. Whether a person who has signed for accommodation can be charged, in case the paper was not negotiated by the party accommodated until after maturity, will depend upon the understanding of the parties to the accommodation transaction. There would seem to be a natural presumption that the accommodating party intended to lend his credit only until the maturity of the paper; and the courts have so decided in this country.

OVERDUE OR DISHONORED PAPER — *continued.*

(Chester *v.* Dorr, I. 793, 799, n. 1. But see First Bank *v.* Grant, 71 Me. 374, *contra.*) But in England the presumption has been thought to be the other way. (Charles *v.* Marsden, I. 748; Stein *v.* Yglesias, I. 760; Sturtevant *v.* Ford, I. 763, 766, n. 2.)

6. The transferor of an overdue bill, furthermore, takes the same subject to any trust or equity in favor of third persons (*In re* European Bank, I. 891); and, on the same principle, a fraudulent vendee of a bill, although he holds the legal title, cannot, by a subsequent sale of the bill after maturity, deprive the defrauded vendor of his right to reclaim the bill. (But see *contra*, I. 894, n. 3.)

7. The transfer of a bill after maturity may, however, deprive a defendant of certain procedural advantages which he would possess against the transferor.

E. g., a plea by way of set-off or a counter-claim, good against the transferor, will not prevail against the transferee. (Burrough *v.* Moss, I. 755, 759, n. 1.) Even though the transferee have notice of the set-off or counter-claim. (Oulds *v.* Harrison, I. 766.)

And a partnership between the transferor and the defendant, although a bar to an action between them, will not defeat an action by the transferee. (I. 748, n. last ¶.)

A note made by a *feme sole* which comes by indorsement after her marriage to her husband, although not the ground of an action by him against her, would seem to be transferable by the husband so as to give his transferee an action in those jurisdictions where the husband is no longer liable for the wife's debts contracted before the marriage. (But see Chapman *v.* Kellogg, I. 874.)

8. By reason of its being a *chose in action*, it seems clear that one who pays a bill or note after maturity pays at the peril of being obliged to make a second payment, if the ostensible holder was not the legal holder, even though the bill or note was payable to bearer or indorsed in blank. (Hinckley *v.* Union R. R., 129 Mass. 52.)

WHEN PAPER IS OVERDUE.

9. Paper payable at a fixed date is not overdue until after presentment on the last day of grace, or until after the expiration of the last day of grace. (I. 788, n. 6. But see *contra*, Pine *v.* Smith, I. 787.)

Bills and notes payable on demand are, by the law of England, not overdue within the rules before stated (§§ 1–8), until after demand, or until after the expiration of the statutory period of limitation to actions. (Brooks *v.* Mitchell, I. 760, 763, n. 1.) But in the United States such paper (except bank notes and certificates of deposit) is overdue after a reasonable time, although no demand is made; and the question, what is a reasonable time, must be determined by the special circumstances of each case. (Losee *v.* Dunkin, I. 782, 783, n. 1.)

Checks are governed in both countries by the American rule just stated. (Ames *v.* Meriam, I. 791, 792, n. 1.)

Bank notes and certificates of deposit are overdue only after demand. (I. 783, n. 1; Bank of Fort Edward *v.* Washington Bank, I. 799, 801, n. 2.)

Dishonored Paper.

10. Is on the same footing with overdue paper in the matter of transfer, *e. g.*, bills dishonored by non-acceptance. (Crossley *v.* Ham, I. 750. See Goodman *v.* Harvey, I. 709.)

OVERDUE OR DISHONORED PAPER — *continued.*
Instalment notes are dishonored by a default in the payment of any instalment. (Vinton *v.* King, I. 788, 791, n. 1.)
But a default in the payment of interest due before the maturity of the note does not work a dishonor of the note. (I. 791, n. 1.)

P.

PAROL ACCEPTANCE. (See ACCEPTANCE, §§ 3–7.)
PAROL DISCHARGE. (See EXTINGUISHMENT, § 16.)
PAROL EVIDENCE. (See COLLATERAL AGREEMENT, §§ 2–7.)
PARTIAL ACCEPTANCE. (See ACCEPTANCE, § 2.)
PARTIAL INDORSEMENT. (See INDORSEMENT, § 11.)
PARTIES.
To an action on a bill must be parties to the bill. (SPECIALTY, § 2.)
To a bill must be certain (FORMAL REQUISITES, §§ 25–33.)
PARTNERSHIP.
Presentment to one partner sufficient. (PRESENTMENT FOR ACCEPTANCE, § 7; PRESENTMENT FOR PAYMENT, § 19.)
Notice of dishonor to one partner sufficient. (NOTICE OF DISHONOR, § 32.)
Note may be made by a, to a partner, or *vice versa*. (FORMAL REQUISITES, § 30.)
A partner has implied authority to sign firm name to negotiable paper for partnership purposes (II. 557, n.), but not in payment of private debt (II. 557, n.), or by way of accommodation (I. 738, 741, n. 3).
Partner has no implied authority to sign the firm name to a blank bill. (PURCHASE FOR VALUE, § 13 (*f*).)
Liable to a purchaser for value without notice, although partner has exceeded his authority. (II. 557, n.)
When a purchaser is affected with notice of a partner's abuse of his authority. (PURCHASE FOR VALUE, §§ 13 (*f*), 14, 16, 17.)
Bill payable to a, must be transferred in the firm name, or in the name of all the partners. (TRANSFER, § 14.)
Not liable, unless bill is signed in firm name, or in name of all the partners. (Kirk *v.* Blurton, II. 552; Siffkin *v.* Walker, II. 550.)
Bill drawn on a, must be accepted in firm name, or in the name of all the partners (II. 554, n. 2), except in jurisdictions where a parol acceptance is valid.
Note reading "I promise" is a joint note. (II. 557, n.)
In whose behalf a bill was signed is alone liable, although having same name with another firm. (II. 557, n.)
Knowledge of partner is knowledge of, when. (DILIGENCE DISPENSED WITH, WHEN, § 14.)
Title to note of a, passes to surviving members. (TRANSFER, § 13.)
PAYEE.
Bill blank as to, is incomplete (FORMAL REQUISITES, § 29), but may be negotiated. (Cruchley *v.* Clarance, I. 128.)
Maker cannot be. (FORMAL REQUISITES, § 29.)
Must be definite. (FORMAL REQUISITES, §§ 29–33.)

PAYEE — *continued.*
Necessity of a. (FORMAL REQUISITES, § 29.)
Fictitious. (PURCHASE FOR VALUE, § 2 (*a*).)
PAYMENT.
To whom payment should be made. (EXTINGUISHMENT, §§ 12–15, 18.)
By whom payment should be made. (EXTINGUISHMENT, §§ 10, 19.)
When payment should be made. (EXTINGUISHMENT, §§ 8, 9; ACCEPTOR AND MAKER, § 15; DRAWER AND INDORSER, § 6; PRESENTMENT FOR PAYMENT, §§ 2–10.)
Where payment should be made. (ACCEPTOR AND MAKER, §§ 13, 14; DRAWER AND INDORSER, § 7; PRESENTMENT FOR PAYMENT, §§ 11–14.)
Effect of part payment. (EXTINGUISHMENT, § 19.)
How far a bill will operate as payment of a pre-existing debt. (SPECIALTY, §§ 6–13.)
Is a personal defense. (DEFENSES, § 5.)
Is no bar to an action by purchaser for value without notice. (PURCHASE FOR VALUE, § 4.)
Bars action by transferee after maturity. (OVERDUE PAPER, § 4.)
Is distinguishable from a purchase. (PURCHASE FOR VALUE, §§ 15, 16.)
Amount of, must be certain. (FORMAL REQUISITES, §§ 18–20.)
Amount of, to be made by acceptor or maker. (ACCEPTOR AND MAKER, § 16.)
Amount of, to be made by drawer or indorser. (DRAWER AND INDORSER, §§ 8–12.)
PAYMENT SUPRA PROTEST, OR FOR HONOR. (See TRANSFER.)
One who volunteers to pay the obligation of another person, must, in general, rely upon that person's generosity for reimbursement. But a stranger who, after a bill has been protested for non-payment, pays the same for the honor of any party or parties liable upon it, may, by the custom of merchants, have recourse to the one for whose honor he intervened, or to any antecedent party. In other words, just as an acceptor for honor occupies substantially the position of an indorser towards all parties subsequent to the party befriended, so the payor for honor occupies towards the party befriended, and all antecedent parties, the position of an indorsee who has taken up the bill.
Accordingly, a payor *supra protest* may sue any of the antecedent parties upon the bill; parties signing for accommodation not excepted. (Mertens *v.* Winnington, I. 886, 888, n. 1.)
And he discharges all subsequent parties. (I. 888, n. 1.)
And as indorsee he must notify the person for whom he has intervened of the dishonor of the bill, if that person has not already been notified by the holder from whom the payor for honor took the bill. (Goodall *v.* Polhill, 1 C. B. 233. See also NOTICE OF DISHONOR, § 18.)
It was held, in Wood *v.* Pugh, 7 Ohio, Part II. 156, that a payor for honor must give notice of his intervention, even though notice of dishonor had been given before the payment for honor was made. (See Byles, Bills, 13th ed., 268, n. (*l*).)
Payment *supra protest* must be preceded or accompanied by a declaration before a notary for whose honor the payment is made; and this declaration is entered by the notary in the act of honor. (Geralopulo *v.* Wieler, 10 C. B. 690, 709.)

PENCIL.
Bill may be drawn in. (I. 145.)
Effect of alteration of part of bill written in pencil. (Harvey *v.* Smith, I. 582.)

PENNY-POST. (See NOTICE OF DISHONOR, §§ 10, 21, 37, 41.)

PLACE.
Of serving notice. (NOTICE OF DISHONOR, §§ 20–25.)
Of presentment. (PRESENTMENT FOR ACCEPTANCE, § 3; PRESENTMENT FOR PAYMENT, §§ 11–14.)
Of payment. (ACCEPTOR AND MAKER, §§ 13, 14; DRAWER AND INDORSER, § 7.)

PLEADING.
Material averments of a declaration. (DEFENSES, § 1.)
Form of action on a bill. (SPECIALTY, §§ 4, 5.)
Averment of presentment not required in an action against acceptor or maker. (ACCEPTOR AND MAKER, § 11.)
Averment of presentment to drawer or indorser not required in actions against them. (DRAWER AND INDORSER, § 5.)
The loss or destruction of a bill is an affirmative defense. (ACCEPTOR AND MAKER, § 11.)

PLEDGE. (See COLLATERAL SECURITY.)

POST, NOTICE BY. (See NOTICE OF DISHONOR.)

POSTAGE. (See DRAWER AND INDORSER, § 12.)

POST-DATED CHECK.
Is not entitled to grace. (GRACE.)

POST-DATING.
A bill may be post-dated. (I. 145.)

PRESENTMENT FOR ACCEPTANCE.

NECESSITY OF PRESENTMENT.

1. Only bills payable after sight need be presented for acceptance. (Philpotts *v.* Bryant, II. 133, 134, n. 1 and 2.)

TIME OF PRESENTMENT.

2. Bills payable after sight must be presented in a reasonable time. (Muilman *v.* D'Eguino, II. 272, 277, n. 1.)
Bills payable at a fixed day may be presented at any time before the last moment of business hours on the day of maturity. (Plato *v.* Reynolds, II. 309.)

PLACE OF PRESENTMENT.

3. A bill addressed to a drawee at a particular place should be presented at that place, *e. g.*, if addressed to him at a particular house in a town, at that house; if at a particular town, at the drawee's residence or place of business in that town.
A bill containing no address should be presented at the drawee's residence or place of business at the time of presentment.
If the drawee is not to be found at the appropriate place for presentment, the bill may be treated as dishonored. (Wolfe *v.* Jewett, 10 La. 383. But see II. 356, n. 1.)

PRESENTMENT FOR ACCEPTANCE — *continued.*

BY WHOM PRESENTMENT SHOULD BE MADE.

4. Inland bills may be presented by the holder, or by any one authorized by him to make presentment.

Foreign bills must be presented by a notary. (See PRESENTMENT FOR PAYMENT, §§ 15, 16.)

TO WHOM PRESENTMENT SHOULD BE MADE.

5. Presentment should be made to the drawee, or some person authorized by him to return an answer. (Cheek *v.* Roper, II. 356.)

Joint Drawees.

6. A bill addressed to several persons, not being partners, should regularly be presented to all. But if any one refuses to accept, the bill being thereby dishonored, no further presentment is necessary.

Bill drawn on a Partnership.

7. If a partnership is the drawee, presentment to any member of the firm is sufficient. (See PRESENTMENT FOR PAYMENT, §§ 18, 19.)

Death of Drawee.

8. If a drawee dies before the bill is presented for acceptance, acceptance according to the tenor is thereby rendered impossible; but the holder, it has been said, should inquire after the personal representative of the deceased, and provided he live within a reasonable distance, present the bill to him. (Byles, Bills, 13th ed., 186. See Smith *v.* Bank of New South Wales, L. R. 4 P. C. 194, 205–208.)

PRESENTMENT FOR PAYMENT.

NECESSITY OF PRESENTMENT.

1. Presentment to the drawee or maker is a condition precedent to the liability of a drawer or indorser, or an acceptor for honor. (DRAWER AND INDORSER, § 2; ACCEPTOR FOR HONOR.)

Whether an acceptor or maker is liable without presentment to himself. (ACCEPTOR AND MAKER, §§ 5–12.)

When a failure to prove a note payable at a bank discharges maker.

Whether a drawer or indorser is liable without a presentment to himself. (DRAWER AND INDORSER, § 5.)

TIME OF PRESENTMENT. (See also CHECKS, § 2.)

2. Presentment for payment to charge a drawer or indorser must be made upon the day the paper falls due. Presentment either before or after maturity is a nullity. (Anon., II. 261, and n. 1 and 2.)

Days of Grace. — Holidays.

3. Paper entitled to grace must be presented on the last day of grace, unless the last day is Sunday or other legal holiday, in which case presentment must be made on the next preceding business day. (Tassell *v.* Lewis, II. 262 and n. 1.)

Paper not entitled to grace, which falls due on a legal holiday, must be presented on the next succeeding business day. (Salter *v.* Burt, II. 294.)

Reckoning of Days and Months.

4. Days of grace are reckoned exclusive of the nominal day of payment, just as days after date or sight are reckoned exclusive of the day of date or sight. (Coleman *v.* Sayer, II. 265 and n. 3.)

Months in bills and notes are calendar months, and are computed from the

PRESENTMENT FOR PAYMENT — *continued.*

day of the month the bill is dated (or accepted in the case of bills payable after sight) to the corresponding day of the month of maturity; or, if there is no corresponding day in the latter month, to the last day of that month. (Wood *v.* Mullen, II. 297, 298, n. 2.)

Demand Bills and Notes.

5. Bills and notes payable on demand are payable without grace, and must be presented as follows: —

Bank notes must be either circulated, or presented, or forwarded for presentment not later than the day after they are received, otherwise the holder loses all right of recourse to his transferor. (Williams *v.* Smith, II. 285.)

Goldsmiths' notes are governed by the same rule. (Moore *v.* Warren, II. 263; Turner *v.* Mead, II. 263; Manwaring *v.* Harrison, II. 264.)

Checks must be presented, or forwarded for presentment, not later than the day after they are received. (Rickford *v.* Ridge, II. 279; Pockington *v.* Sylvester, II. 284; Smith *v.* Janes, II. 292, 293. The case of Hankey *v.* Trotman, II. 266, is not law.) If there is no post on the day after the receipt of the bank note or check, or if the only post of that day leaves at an inconveniently early hour, it is enough to forward the paper by the next succeeding post. (II. 284, n. 1.) In Smith *v.* Janes, *supra*, it was assumed that the holder of a check had the option of circulating or presenting it, as in the case of a bank note. But this assumption seems not well founded. A bank note is issued expressly for circulation; while a check, although negotiable, is drawn or transferred with the expectation of immediate payment.

Promissory notes of an individual must be presented in a reasonable time after their transfer. What is a reasonable time will depend upon the circumstances of each case. (Field *v.* Nickerson, II. 288.) But in New York presentment may be made at any time before the holder's right of action against the maker is barred by the statute of limitations. (Merritt *v.* Todd, II. 303.)

Bills payable on demand, it has been held, should be presented in a reasonable time. (Nat. Bank *v.* Second Bank, II. 311, 312, n. 1. But see Byles, Bills, 13th ed., 213.)

Bills payable at sight must be presented within a reasonable time. (Muilman *v.* D'Eguino, II. 272.)

Excusable Delay.

6. In certain cases a presentment subsequent to the day of payment is seasonable, *e. g.*,

where commercial intercourse with the country of the drawee or maker is interrupted or perilous (Patience *v.* Townley, II. 278, 279, n. 1);

where the mail miscarries (Pier *v.* Heinrichshofen, II. 316, 319, n. 2;)

where the note is lost (Aborn *v.* Bosworth, 1 R. I. 401);

where the holder is too ill to make presentment himself or appoint an agent to act in his behalf. (Wilson *v.* Senier, 14 Wis. 380.)

where the halves of a bank note are sent by different conveyances (Williams *v.* Smith, II. 285).

A note maturing after the death of the holder, and before the appointment of an administrator, is duly presented the day after the administrator discovers it, provided he has been reasonably diligent in examining the papers of the deceased. (White *v.* Stoddard, II. 300, 302, n. 13.)

PRESENTMENT FOR PAYMENT — *continued.*

A delay in presenting a bill payable on demand, caused by the holder's stopping to attend to business while crossing the State of Pennsylvania, has been held excusable. (Nat. Banking Co. *v.* Second Bank, II. 311.)

Inexcusable Delay.

7. A delay caused by the holder's taking a bill so near the time of its maturity that it is impossible for him to present it when due to a distant drawee, is not excusable. It is the holder's folly to take the bill under such circumstances. (Anderton *v.* Beck, II. 281. The cases cited II. 283, n. 1, *contra*, are not to be supported. See also Field *v.* Nickerson, II. 290.)

Hour of Presentment.

8. Paper must be presented at a reasonable time of day, *e. g.*, presentment at a bank should be during banking hours; at one's place of business during the usual business hours; at one's residence between the usual hours of rising and retiring. (Barclay *v.* Bailey, II. 322; Parker *v.* Gordon, II. 320, 322, n. 1; Salt Springs Bank *v.* Burton, II. 325.)

9. But presentment after banking hours will be seasonable if the holder finds any one at the bank authorized to return him an answer. (Garnett *v.* Woodcock, II. 323; Salt Springs Bank *v.* Burton, II. 325.)

10. Nor will such a presentment be less effective to charge an indorser from the fact that the indorser was ready to pay, and would have paid, the bill or note if it had been presented before the close of banking hours. (Salt Springs Bank *v.* Burton, II. 324.)

It was said, however, in the same case (II. 326, 327), Newark County *v.* Bishop, 3 E. D. Sm. 48, being cited and approved, that a presentment after banking hours to the person authorized to return an answer would not be sufficient to charge an indorser if the maker or a prior indorser left funds at the bank for the payment of the bill or note until the close of banking hours. But the propriety of this distinction may be doubted. It is the maker's or acceptor's duty to have funds at the bank from the beginning of banking hours on the day of maturity, and to leave them there until called for. To say that an indorser will be discharged by the withdrawal of the maker's funds at the close of banking hours is to say that a surety is discharged by a breach of duty of the principal to his creditor.

PLACE OF PRESENTMENT.

Paper payable at a Particular Place.

11. A bill drawn or a note made payable at a particular place must be presented at the place named, *e. g.*, paper payable at a particular house in a town named, at that house; paper payable generally in a particular town, either at the place of business or residence of the drawee or maker in that town. If the drawee or maker has neither place of business nor residence in the town named, the presence of the holder with the bill anywhere in the limits of the town is enough. (Gibb *v.* Mather, II. 330 and 333, n. 1; Barnes *v.* Vaughan, II. 358; II. 329, n. 1.)

A bill drawn payable generally, but accepted payable at a particular place, must be presented at that place. (II. 331, n. 1.) Niagara Bank *v.* Manufacturing Co. II. 346, *contra*, is not to be supported.

12. Paper expressly payable at more than one place may be presented at any one of the places named, *e. g.*, paper payable in bank in a given city may

PRESENTMENT FOR PAYMENT — *continued.*

be presented at any bank in the city. (Beeching *v.* Gower, II. 329 and n. 1.)

Paper payable generally.

13. If no place of payment is indicated in the bill or note, presentment must be made either at the place of business or residence of the drawee or maker at the time of maturity. The holder may present at either the place of business or place of residence at his option, and in no case need he make presentment at both places, even though at the place selected neither the drawee or maker is to be found, nor any one authorized to act for him. (Barnes *v.* Vaughan, II. 358; Sussex Bank *v.* Baldwin, II. 336, 337, n. 3 Bank of Red Oak *v.* Orvis, II. 349 and n. 2; Taylor *v.* Snyder, II. 340.)

Presentment in the street is not sufficient. (King *v.* Holmes, 11 Pa. 456. See Baldwin *v.* Farnsworth, 10 Me. 414.)

14. If a note is dated at a particular place, and before its maturity the maker removes into another jurisdiction, a presentment at the place of date will be sufficient. (II. 335.)

But in all other cases presentment must be made, according to the decisions in this country, at the actual residence or place of business of the maker irrespective of the place of date, as in Taylor *v.* Snyder, II. 338, where the maker of a note dated in New York resided in Florida, or Anderson *v.* Drake, II. 334, where the maker of a note dated at one town in New York removed before its maturity to another town in the same State.

It may be doubted whether this view would be adopted in England, and it is certainly opposed to the law upon the continent of Europe. See also Cox *v.* Nat. Bank, 100 U. S. 704.

BY WHOM PRESENTMENT SHOULD BE MADE.

15. A foreign bill must be presented by a notary in person. (Ocean Bank *v.* Williams, II. 350; Sussex Bank *v.* Baldwin, II. 338.)

But a presentment by a notary's clerk has been held sufficient if warranted by usage. (II. 352, n. 1, n. 2.)

16. An inland bill or a note may be presented by the holder or by any one authorized by him to make presentment. (Sussex Bank *v.* Baldwin, II. 336, 338, n. 6.)

TO WHOM PRESENTMENT SHOULD BE MADE.

17. Presentment should be made to the drawee or maker, or to some person authorized by the drawee or maker to return an answer. (Brown *v.* Turner, II. 353 and n. 4; Cheek *v.* Roper, II. 356.)

Joint Drawees or Makers.

18. If there are several drawees or makers, not being partners, presentment for payment must be made to all of them. (Arnold *v.* Dresser, II. 360 and n. 1; Willis *v.* Green, II. 425.)

Partnership.

19. But a presentment to any one of several drawees or makers, being partners when the bill or note is drawn, is sufficient, whether made before or after the dissolution of partnership. (Brown *v.* Turner, II. 353 and n. 2 and n. 3.)

Death of Drawee or Maker.

20. If a bill or note is payable generally, and the maker or drawee is not living at the maturity of the paper, presentment should be made to his executor or administrator. (Magruder *v.* Bank of Georgetown, II. 508, 510, n. 1.)

PRESENTMENT FOR PAYMENT — *continued.*

If there is no personal representative, presentment should be made at the former residence or place of business of the deceased. (II. 510. See DILIGENCE DISPENSED WITH, WHEN, § 10.)

If a bill or note is payable at a particular place it can hardly be doubted that the holder has the right to treat the paper as dishonored if on presentment at that place it is not paid, even though presentment might in fact be made elsewhere to the executor or administrator of the deceased. But the point seems not to have been adjudicated

MODE OF PRESENTMENT.

Presentment need not be personal.

21 If a bill is drawn or accepted, or a note made, payable at the house of one who happens to be the holder of the paper at maturity, there is a sufficient presentment and dishonor if the holder either satisfies himself that he has no funds of the party directing payment at his house, or if he refuses to appropriate funds of that party to the payment of the paper. (Saunderson *v.* Judge, II. 354, 355, n. 1.)

22. If presentment is made at the proper place, and neither the drawee or maker is to be found there, nor any person authorized to return an answer, the bill or note is dishonored without more. (Hine *v.* Allely, II. 357 and n. 3; Sussex Bank *v.* Baldwin, II. 337, n. 3; Bank of Red Oak *v.* Orvis, II. 349, n. 2. See *supra*, § 13.)

23. As the holder is entitled to payment only upon surrendering the bill or note to the drawee or maker, it is obvious that a demand of payment by one who has not the bill or note in his possession at the time and place of demand is not a due presentment. (Arnold *v.* Dresser, II. 359, 360, n. 2.)

If a bill is lost, presentment of a copy with an offer of indemnity is proper. (Hinsdale *v.* Miles, 5 Conn. 331.)

24. A bank notice sent to a maker, and directing him to come to the bank where the note is and pay it, is of course a nullity. (Barnes *v.* Vaughan, II. 358.)

The practice in Massachusetts and Maine to the contrary must be regarded as provincial. (II. 359, n. 1.)

25. Presentment may be made by the holder to the drawee or maker directly by mail. (II. 359, n. 1; Indig *v.* Nat. Bank, 80 N. Y. 100, 103.)

26. Presentment must be according to the tenor of paper, *e. g.*, "A demand of gold in payment of a note payable in 'dollars' of U. S. money," is not a due presentment. (Langenberger *v.* Kroeger, II. 361.)

PRINCIPAL AND AGENT. (See AGENT.)

PRINCIPAL AND SURETY. (See SURETY.)

PRIVITY. (DEFENSES, § 4; PURCHASE FOR VALUE, § 4.)

PROMISE. (See FORMAL REQUISITES.)

PROMISSORY NOTE. (See FORMAL REQUISITES.)

PROOF IN BANKRUPTCY. (See BANKRUPTCY.)

PROTEST. (See ACCEPTOR FOR HONOR; PAYMENT SUPRA PROTEST.)

Necessity of, to charge drawer and indorser. (DRAWER AND INDORSER, § 3.)

For better security. (Anon., II. 261.)

Need not be mentioned in notice of dishonor. (II. 452, n. 1.)

Copy of, need not accompany notice of dishonor. (NOTICE OF DISHONOR, § 6.)

PROTEST — *continued.*

WHAT BILLS MUST BE PROTESTED.

1. Foreign bills must be protested when dishonored. (Gale *v.* Walsh, II. 114 and n. 1; II. 452, n. 1.

Inland bills and promissory notes need not be protested. (II. 114, n. 1.)

The protest may be for non-acceptance, non-payment, or for better security. (Byles, Bills, 13th ed., 263.)

WHAT THE PROTEST MUST CONTAIN.

2. A protest must set forth: (1) a fair description of the bill protested; (2) the fact of presentment for acceptance or payment; (3) the fact of dishonor, with the reason, if any, therefor; (4) the fact of protest; (5) the signature and seal of the notary. (II. 451.)

Description of the Bill.

3. The description need not be a literal copy of the bill. A partial, or even an inaccurate, description is sufficient if the party to be charged could not reasonably be misled thereby. (Dennistoun *v.* Stewart, II. 450.)

WHEN THE PROTEST SHOULD BE MADE.

4. Although a bill must be noted by the notary on the day it is presented by him and dishonored, the instrument of protest, it has been held, may be drawn up at any time before action brought. (Chaters *v.* Bell, II. 449.)

The *dictum* in Dennistoun *v.* Stewart, II. 451, that the protest may be drawn up at any time before trial, cannot be defended upon principle. (II. 114, n. 1, last ¶.)

WHERE THE PROTEST SHOULD BE MADE.

5. The protest should be made at the place where the bill is dishonored. (II. 450, n. 1.)

BY WHOM THE PROTEST SHOULD BE MADE.

6. The protest must be drawn up by a notary personally (II. 352, n. 2); and by the same notary who presented and noted the bill. (II. 450, n. 1.)

PROVISION FOR PAYMENT.

Drawing bills without. (DILIGENCE DISPENSED WITH, WHEN, § 2.)

PURCHASE FOR VALUE WITHOUT NOTICE.

PURCHASE FOR VALUE WITHOUT NOTICE AS A SOURCE OF TITLE.

Paper Negotiable by Delivery.

1. In general, if the possessor of property has no title he can convey none to a purchaser. An exception exists in the case of the current coin of the country, passed as money; and, by the custom of merchants, negotiable paper transferable by delivery, *i.e.*, paper payable to bearer or indorsed in blank, has been placed upon the same footing with money in this respect.

Accordingly a purchaser for value, without notice from one in possession of such paper, acquires a perfect title to it, irrespective of the title of his vendor. (Miller *v.* Race, I. 400, 407, n. 1; Grant *v.* Vaughan, I. 299; Peacock *v.* Rhodes, I. 410, 412, n. 2; see also Langdell, Summary of Equity Pleading, § 139.)

A pledgee for a present advance is a purchaser within this rule (Collins *v.* Martin, I. 450); for a pledgee of negotiable paper, unlike the pledgee of ordinary chattels, acquires the legal title to the pledge. (I. 324, n. 1)

It is believed that the transfer by a bankrupt of paper which passes by

PURCHASE FOR VALUE WITHOUT NOTICE — *continued.*

delivery will give no title to his immediate transferee ; but the transferee of the latter, if a purchaser for value without notice, will of course get a good title. (I. 773, n. 3.)

Paper Negotiable only by Indorsement.

2. The title to paper negotiable by indorsement cannot be transferred except by the indorsement of the legal holder. Accordingly even a purchaser for value without notice acquires no title in any of the following cases: —

(*a*) Under a forged indorsement. (Smith *v.* Chester, I. 418; Mead *v.* Young, I. 429, 433, n. 2; Allport *v.* Meek, I. 495; Beeman *v.* Duck, I. 503.)

If a bill or note is made payable to, and indorsed in the name of a fictitious payee, it may be properly treated as against a drawer, acceptor, or maker who is cognizant of the fact, — but not otherwise (Bennett *v.* Farnell, I. 461; Hunter *v.* Jeffery, I. 453; Beeman *v.* Duck, I. 503), — as an instrument payable to the actual person who wrote the fictitious indorsement; and upon a count describing the bill or note as payable to and indorsed by that person under the assumed name, the plaintiff might properly be entitled to judgment in a case like that of Minet *v.* Gibson, I. 419. (See also Cooper *v.* Meyer, I. 493; Beeman *v.* Duck, I. 503; Hortsman *v.* Henshaw, I. 562.) But the judgment of the court in Minet *v.* Gibson, upon the count describing the bill as payable to bearer, seems anomalous.

(*b*) Under an indorsement by an unauthorized agent. (Robinson *v.* Yarrow, I. 475.) But if an indorsement made in violation of special instructions to the agent was executed by him while acting within the scope of his general authority, it will be effectual both as a contract and a transfer in favor of a purchaser for value without notice. The wrongful indorsement of a partnership name by one of the partners is a frequent illustration of this rule. (II. 557, n.)

(*c*) Under the indorsement of a bankrupt. (Smith *v.* DeWitt, I. 611 and n. 1.)

In Drayton *v.* Dale, I. 477, and Braithwaite *v.* Gardiner, I. 509, the indorsee of a bankrupt recovered judgment againt a maker and acceptor respectively, but in each case the instrument was executed by the defendant with knowledge of the bankruptcy, and in the former case the assignee of the bankrupt made no claim to the note, and although in the latter case the assignee claimed the bill, the plea did not show that the consideration for the bill was of a nature to justify his claim.

(*d*) Under the indorsement of a married woman. (Barlow *v.* Bishop, I. 458.)

In Smith *v.* Marsack, I. 513, the acceptor of a bill executed to a married woman with knowledge of her coverture, was held liable to her indorsee, a purchaser for value without notice of her incapacity. But this decision, it is submitted, was erroneous.

(*e*) Under the indorsement of an insane person, or other person having no capacity to indorse. (Peaslee *v.* Robbins, I. 561, 562, n. 1.)

In Hallifax *v.* Lyle, I. 517, the indorsee of a corporation which had no authority to indorse bills, maintained an action against the acceptor. But this case may perhaps be supported on the ground that the corporation, though prohibited from making an indorsement by way of contract, might lawfully make an indorsement by way of transfer. (See Smith *v.* Johnson, 3 H. & N. 222.)

PURCHASE FOR VALUE WITHOUT NOTICE — *continued.*

Title by Estoppel to Paper never in fact executed by the Defendant.

8. Title of course cannot be predicated of a bill or note which has no legal existence; nevertheless the defendant by his conduct may be precluded as against a purchaser for value without notice, from denying the execution of the bill purporting to be signed by him, *e.g.*, —

(*a*) Although a person who has signed a negotiable instrument, under the belief that he was signing a guaranty or other non-negotiable contract, is in fact not a party to the negotiable instrument, and therefore as a rule not chargeable thereon (Foster *v.* Mackinnon, I. 540, 547, n. 2; Caulkins *v.* Whisler, I. 580, 582, n. 1), yet if he signed carelessly, as by not reading the paper when he might have read it, he will not be permitted to show the truth, but will be liable as if he had in fact known the character of the instrument. (I. 547, n. 2. See Addenda et Corrigenda.)

(*b*) A bill, note, or indorsement is not complete without a delivery *animo contrahendi*. (FORMAL REQUISITES, § 35; INDORSEMENT, § 16.) But one who has signed a bill or note will not always be permitted to rely upon the absence of such delivery in order to defeat the title of a purchaser for value without notice. *E. g.* the title of such a purchaser is unimpeachable although the paper was delivered to a third person as an escrow, and afterwards wrongfully delivered by him to the payee before condition performed (Fearing *v.* Clark, I. 571, 573, n. 1); or although the paper was deposited with the payee, not as an obligation, but as a receipt or memorandum for safe keeping, and by the payee wrongfully transferred (Eastman *v.* Shaw, 65 N. Y. 522, *semble;* Paulette *v.* Brown, 40 Mo. 52); or even, according to some authorities, although the paper was never delivered to any one, but wrongfully taken from the possession of the party signing it. (Clarke *v.* Johnson, I. 579, 580, n. 2.) The *ratio decidendi* in these cases would seem to be equally applicable although the instrument signed by the defendant was not fully filled out, if it at the time of signing it appeared to be an inchoate bill or note, as in the case of a printed blank form of a bill or note. But Baxendale *v.* Bennett, I. 553, is *contra*. Of course one who writes his signature upon a common piece of blank paper, which is afterwards wrongfully filled up as a negotiable instrument, cannot be made liable to any one. (Baxendale *v.* Bennett, I. 553; Caulkins *v.* Whisler, I. 580, 582, n. 1.)

(*c*) No one can acquire a title to a forged or unauthorized bill, acceptance, or note. But a defendant may be precluded by his conduct from showing that his signature was forged or written without authority. Thus a principal cannot show against a purchaser for value without notice that an instrument purporting to bind him was in fact executed by an agent who exceeded his authority, if the agent was in general authorized to affix the principal's signature to negotiable paper. Accordingly a trading partnership is not permitted to prove against a purchaser for value without notice that an instrument purporting to bind the firm was in fact executed by one of the partners for his individual debt, or by way of accommodation, or for any other purpose inconsistent with his duty to the firm. (II. 557, n.)

(*d*) Similarly the possession by one person of a bill, acceptance, note, or indorsement delivered to him, signed in blank by another, is conclusive evidence to a purchaser for value without notice of authority in the possessor to complete the instrument by filling up the blanks in any way

PURCHASE FOR VALUE WITHOUT NOTICE — *continued.*

he may see fit. (I. 717, n. 2, first ¶; I. 723, n. 1, second ¶; Mitchell *v.* Culver, I. 733, 734, n. 1; but see *contra*, Awde *v.* Dixon, I. 715; Hatch *v.* Searles, *semble*, I. 718; Hogarth *v.* Latham, I. 548. See *infra*, § 13 (*f*).) *A fortiori* a purchaser is protected where he buys the paper as a completed instrument, with no knowledge that the blanks were filled by his vendee. (Montague *v.* Perkins, I. 522, 526, n. 1; Barker *v.* Sterne, I. 527, 529, n. 1; London Bank *v.* Wentworth, 5 Ex. D. 96.)

PURCHASE FOR VALUE WITHOUT NOTICE AS A BAR TO EQUITIES OR DEFENSES. (See also DEFENSES.)

Personal Defenses. (See DEFENSES, §§ 4, 5.)

4. It is a familiar doctrine of equity that one who purchases a legal title for value and without notice, takes the title discharged of all equities to which it was subject in the hands of his vendor, *e.g.*, a trust, or equitable right to a reconveyance on the ground of fraud; for an equity, being in its nature a claim *in personam* and not *in rem*, can be enforced only against a party to the transaction in which the equity arises, or some one in privity with that party. (Langdell, Summary of Equity Pleading, § 141.) The transfer of bills and notes, by virtue of their negotiability, is governed by the same principle.

A purchaser for value without notice, therefore, from the legal holder, acquires a title free from any trust or incumbrance, or collateral agreements, or any one of the following personal defenses: —

Fraud. (I. 464, n. 1; Hayes *v.* Caulfield, I. 506.)

Duress. (Duncan *v.* Scott, I. 460, 461, n. 1.)

Failure of consideration. (I. 464, n. 1.)

Illegality. (Potter *v.* Tubbs, I. 464 and n. 1.)

Release by deed executed before maturity. (Dod *v.* Edwards, I. 486.)

Premature payment, or accord and satisfaction. (Burbridge *v.* Manners, I. 465, 466, n. 1; Morley *v.* Culverwell, I. 497.)

Mutual mistake in the framing of the instrument, *e.g.*, in antedating it. Huston *v.* Young, I. 890, n.

5. The right of a holder for value without notice to charge a drawer or indorser who has not been notified of the dishonor of a bill by non-acceptance (Dunn *v.* O'Keefe, I. 468) has been treated as an illustration of the same principle which governs the cases mentioned in the preceding section. But it is believed that the true explanation of Dunn *v.* O'Keefe, will be found in the fact that, by the custom of merchants and by the settled law upon the continent of Europe, the holder's failure to give notice of dishonor by non-acceptance is prejudicial to him only so far as relates to any proceeding against the drawer or indorser upon that dishonor, he or any subsequent holder having the right to make another presentment either for acceptance or payment, and to charge the drawer or indorser by notice of dishonor just as if the bill had never been presented before. This view accounts for the fact that a holder by taking an acceptance *supra protest* does not discharge the drawer and indorsers. (Byles, Bills, 13th ed., 268 n. (*l*).)

Real Defenses.

6. The equitable or personal defenses just mentioned must be carefully distinguished from the following common law or statutory defenses, which, being good against every holder, may be called real defenses. (See DEFENSES, §§ 2, 3.)

PURCHASE FOR VALUE WITHOUT NOTICE — *continued.*
Infancy. (Williamson *v.* Watts, I. 463 and n. 1.)
Coverture. (Connor *v.* Martin, I. 395, n. 2.)
Insanity. (Sentance *v.* Poole, I. 492, 493, n. 1.)
Extreme intoxication. (But see *contra*, Wilson *v.* Nisbet, I. 558, n. 1.)
Usury. (Lowe *v.* Waller, I. 413, 416, n. 2. But see Towne *v.* Rice, I. 591.)
Gaming consideration. (Bowyer *v.* Bampton, I. 399, 400, n. 2.)
Evasion of stamp laws. (Bennison *v.* Jewison, I. 512; compare Barker *v.* Sterne, I. 527.)
Cancellation. (Ingham *v.* Primrose, I. 530, *contra*, is overruled; see Baxendale *v.* Bennett, I. 553, 556.)
Alteration. (Master *v.* Miller, I, 434, 447, n. 1; Hall *v.* Fuller, I. 482; Langton *v.* Lazarus, I. 495; Wait *v.* Pomeroy, I. 576, 578, n. 5; McGrath *v.* Clark, I. 584; Citizens' Bank *v.* Richmond, I. 607.
7. In certain cases, however, where the defendant by his careless mode of issuing a bill facilitated its alteration his conduct was considered sufficient to estop him from relying upon the alteration as a defense, *e.g.* —
Leaving blank spaces near the words and figures indicating the amount payable. (Young *v.* Grote, I. 486; Pagan *v.* Wylie, I. 559; I. 527, n. 1; but see Baxendale *v.* Bennett, I. 553; McGrath *v.* Clark, I. 584; Greenfield Bank *v.* Stowell, 123 Mass. 196.)
By writing the amount in pencil. (Harvey *v.* Smith, I. 582.)
By signing a contract a portion of which might be easily detached so as to leave a negotiable note. (Wait *v.* Pomeroy, I. 578, n.; Brown *v.* Reed, I. 598.)

VALUE.

8. Value is either money or money's worth.
One gives value who surrenders negotiable securities. (Bank of Salina *v.* Babcock, I. 639, 639, n. 1.)
Or gives his own signature to negotiable paper. (Williams *v.* Smith, I. 641 and n. 1.)
Or extinguishes a debt by merging it in the paper taken for it. (Bank of Sandusky *v.* Scoville, I. 639, 640, n. 1; I. 630, n. 1; Brown *v.* Leavitt, I. 668, 669, n. 7.)
An agreement to forbear has been held to be value, being the surrender of a right. (I. 637, n. 1; Oates *v.* First Bank, 100 U. S. 239. But see *contra*, Francia *v.* Joseph, I. 635, 637, n. 1.)
On the same principle, paper taken in conditional payment of a debt is said to be taken for value, because of the suspension of the creditor's right of action upon the debt. (Poirier *v.* Morris, I. 612; Currie *v.* Misa, I. 615, *semble*, 630, n. 1; Swift *v.* Tyson, I. 642, 650, n. 1. But see *contra*, I. 667, 668, third ¶.) The conflict of authority on this question would have been avoided if the courts had adopted the view of merchants that a creditor who takes a bill or note in payment of his debt merges the debt in the paper.
Paper taken merely as collateral security for an antecedent debt is not taken for value. (Bay *v.* Coddington, I. 631, 634, n. 1; Stalker *v.* M'Donald, I. 651, 667, n. 1. But see cases cited I. 650, n. 1, third ¶, *contra*.)
9. A creditor who takes a bill or note from a wrongful transferor, either in conditional payment of, or as collateral security, for his debt, cannot recover upon the paper more than his debt. (Williams *v.* Hill, I. 641, 642 n. 1; Dresser *v.* Railway Company, I. 679, *semble*.)

PURCHASE FOR VALUE WITHOUT NOTICE — *continued.*

But a purchaser may recover its face value although he paid less. (Lay *v* Wissman, I. 674, 676, n. 5. But see *contra*, Holcomb *v.* Wyckoff, I. 670, 673, n. 7.)

If, however, one who has purchased paper receives notice of prior equities before he makes or completes the payment of the purchase money, he is a purchaser for value only to the amount which he paid before notice. (Dresser *v.* Railway Company, I. 676, 679, n. 5.)

NOTICE.

10. The notice by which a privity is established between a purchaser and his vendor is either actual or constructive.

Actual Notice.

11. By actual notice is meant either knowledge or the means of knowledge to which the purchaser dishonestly shuts his eyes.

Negligence, however gross, does not of itself affect a purchaser with notice. It is, at most, only evidence of bad faith. (Lawson *v.* Weston, I. 689; Goodman *v.* Harvey, I. 709, 713, n. 1.) The contrary doctrine of Gill *v.* Cubitt, I. 696, 703, n. 1, and Crook *v.* Jadis, I. 708, is overruled.

12. Actual notice will not prejudice a purchaser if his vendor was a purchaser for value without notice. (Chalmers *v.* Lanion, I. 691, n. 3.) The cases in the last ¶ of n. 3, pp. 691, 692, can be sustained only upon the ground of avoiding circuity of action.

Constructive Notice.

13. One to whom a bill is offered is affected with constructive notice of everything apparent on the face of the instrument; in other words, he is conclusively taken to have read it. A purchaser must take notice at his peril, therefore, of

(*a*) A restrictive indorsement. (Ancher *v.* Bank of England, I. 686; Treuttel *v.* Barandon, I. 694; Lloyd *v.* Sigourney, I. 704, 708, n. 1. See also Buckley *v.* Jackson, I. 731, 732, n. 2.)

(*b*) Or a conditional indorsement. (Robertson *v.* Kensington, I. 692, 694, n. 1.)

(*c*) Or the time of payment. (Miller *v.* Crayton, I. 888.)

(*d*) Or that a bill bears the notarial marks of dishonor for non-acceptance. (Crossley *v.* Ham, I. 750, *semble.*) The case of Goodman *v.* Harvey, I. 709, is not *contra*, for the defendant not being entitled to notice of dishonor for non-acceptance, the payee retained his right to the bill at the time it was discounted, and as he delivered the bill to his agent to get it discounted, he could not reclaim it from the plaintiff unless he could show that the plaintiff colluded with his agent.

(*e*) Or a signature "per procuration," and, as a legal consequence, the limited authority of the agent so signing. (I. 717, n. 2.)

(*f*) Or unfilled blanks in a bill, and, as a legal consequence, the agency of the possessor to fill them. By the English decisions a purchaser for value must ascertain, at his peril, the actual extent of the agent's authority. (Awde *v.* Dixon, I. 715 — blank for payee's name; Hatch *v.* Searles, I. 718 — blank for amount; Hogarth *v.* Latham, I. 548, *semble* — blank for drawer's name). In this country, on the other hand, a purchaser for value may safely take a bill partially blank in reliance upon the ostensible authority of the agent to fill up the blanks as he sees fit, the principal being precluded from showing against such a purchaser any qualification

PURCHASE FOR VALUE WITHOUT NOTICE — *continued.*

of the agent's authority (I. 717, n. 2, 1st ¶ — blank for payee's name; I. 723, n. 1, 2d ¶ — blank for amount; Mitchell *v.* Culver, I. 733, 734, n. 1 — blank for date. See also *supra*, § 3 (*d*).) In Hogarth *v.* Latham, *supra*, the blank bill purported to be signed by a partnership, and the decision was put mainly upon the ground that it was beyond the implied power of a partner to sign the firm name to an incomplete bill. Chemung Bank *v.* Bradner, 44 N. Y. 680, however, is *contra*, although the English court attempted to draw a distinction between the two cases.

14. A partner has of course no implied authority to sign the name of his firm to a bill or note in payment of a private debt. (II. 557, n.) But the rights of a creditor who takes such paper will vary greatly according to the form of the instrument.

Thus, if a creditor takes a firm note, payable to himself from his debtor, a partner in the firm, he must know that his debtor in issuing the note is acting as the agent of his firm, and he must prove therefore at his peril that it was issued by the authority of all the partners. (Leverson *v.* Lane, 13 C. B. N. S. 278.)

On the other hand, inasmuch as a partner may hold as his own property a note executed to him by his firm, and may of course indorse such a note in payment of a private debt, a creditor who takes as indorsee a note payable by the firm to the partner, his debtor, believing it to be the individual property of the partner, may charge the firm as makers, even though the note was in fact made in fraud of the partnership. (Ridley *v.* Taylor, 13 East, 175; *Ex parte* Bushell, 3 M. D. & D. 615; Smith *v.* Lusher, 5 Cow. 688, *semble*. See also *infra*, § 16, last ¶, and compare *Re* Riches, 5 N. R. 287.)

15. It was held in Bank of Brooklyn *v.* Hammett, I. 742, that the possession by the acceptor or maker of a bill or note bearing the signature of a drawer or indorser, was constructive notice of any limitation upon the possessor's authority to deal with the paper so as to charge the drawer or indorser. But this view cannot be sustained either by authority (see I. 743–744, n. 3) or upon principle; for the possession by the acceptor or maker is consistent with at least two states of fact, in either of which the negotiation of the instrument would be entirely justifiable. The instrument may have been signed by the subsequent parties, and delivered to the acceptor or maker for accommodation, or the acceptor or maker may have acquired the paper by way of purchase, and not by way of payment. (Attenborough *v.* Mackenzie, I. 842, 844, n. 1.) Such possession, therefore, so far from amounting to constructive notice, can hardly be said to create even a presumption of actual notice.

16. The question of notice would seem to be a question of fact, and not a question of law, even in cases where the subsequent party is a partnership. For although a purchaser could not charge a firm if he bought the paper as accommodation paper, without proving that it was made by the actual authority of all the partners (I. 741, n. 3), he may still be able to show that he supposed that the prior party from whom he took it had acquired the paper by way of purchase, and was therefore entitled to negotiate it. (Attenborough *v.* Mackenzie, I. 842, 844, n. 1.) But unless the purchaser offers evidence that he acted upon that supposition, the judge would naturally direct the jury to find against him. (See Fielden *v.* Lahens, I. 738, 741, n 3.)

PURCHASE FOR VALUE WITHOUT NOTICE — *continued.*

If the prior party to paper subsequently indorsed by a firm is one of the partners, a purchaser from him is protected if he buys the paper as the property of the firm, for he has the right to assume that the paper represents an obligation of that party to the firm, and that his possession is the possession of the firm. (Wait *v.* Thayer, 118 Mass. 473; Tevis *v.* Tevis, 24 Mo. 535.)

So also where a note payable to A. & Co., and bearing the blank indorsement of that firm, and also the subsequent blank indorsement of the defendant firm of B. & Co., written by one of the partners of that firm without authority, was discounted by the plaintiff, and the money paid to X., a partner in the firm of A. & Co., the plaintiff was not affected with constructive notice of the misuse of the defendant's name, inasmuch as the plaintiff might well have taken the note in the belief that X. sold it as owner, and not as agent for the firm of A. & Co. (Freeman's Bank *v.* Savery, 127 Mass. 75, 78; see also *supra*, § 14.)

17. If a firm signature is in the form of an irregular indorsement, it is obviously an accommodation signature, and a purchaser must prove at his peril that it was given with the actual authority of all the partners. (West St. Louis Bank *v.* Shawnee Bank, 95 U. S. 557; Davis *v.* Blackwell, 5 Bradwell, 82; Nat. Bank *v.* Law, 127 Mass. 72.)

18. There would seem to be a natural presumption that a note made payable to a married woman was intended for her separate use; but the decisions are very strong to the effect, that in the absence of language expressly excluding him from the beneficial interest, the husband will take the property not as trustee, but for his own benefit; and this doctrine may serve to explain the decision, but not the reasoning, in Dawson *v.* Prince. (I. 724.)

19. The addition of the words "without recourse" to an indorsement is not constructive notice of any infirmity in the paper (Epler *v.* Funk, I. 734, 735, n. 1);

nor does the mention of the consideration affect a purchaser with notice of its failure. (I. 735, n. 1.)

20. The doctrine of *lis pendens* has no application to the transfer of negotiable paper. (Kieffer *v.* Ehler, I. 735, 737, n. 10.)

R.

RATIFICATION.

Of a note by an infant. (I. 463, n. 1.)

Forgery incapable of. (FORGERY.)

RECEIPT.

Note may be shown to be a. (COLLATERAL AGREEMENT, § 5.)

RE-EXCHANGE.

Liability of acceptor and maker for. (ACCEPTOR, § 1; ACCEPTOR AND MAKER, § 16.)

Liability of drawer and indorser for. (DRAWER AND INDORSER, § 12.)

RELATION.

Bills in blank, when filled up, operate by. (ACCEPTANCE, § 9; INDORSEMENT, § 6.)

RELEASE.
Before maturity is a personal defense. (DEFENSES, § 5.)
After maturity is a real defense. (DEFENSES, § 3 (*c*).)
Bars an action by transferee after maturity. (OVERDUE PAPER, § 4.)
Of principal discharges surety. (DEFENSES, § 5; SURETY.)
By parol is valid. (EXTINGUISHMENT, § 16.)
By one not a holder at the time is valid. (Scott *v.* Lifford, 1 Camp. 246, 250.)
REMOVAL.
Of acceptor or maker excuses non-presentment, when. (DILIGENCE DISPENSED WITH, WHEN, § 9.)
Of drawer and indorser may excuse the sending of notice of dishonor to the wrong place. (NOTICE OF DISHONOR, § 24.)
RENEWAL OF A BILL.
Agreement to renew is no bar to action on original bill. (COLLATERAL AGREEMENT, § 4.)
REQUEST TO PAY. (FORMAL REQUISITES, § 2.)
RESIDENCE.
Presentment, when to be made at. (PRESENTMENT FOR PAYMENT, §§ 11–14.)
Notice of dishonor, when to be served at. (NOTICE OF DISHONOR, §§ 20–23.)
RESTRICTIVE INDORSEMENT. (See INDORSEMENT, §§ 6–8.)
RETRANSFER.
No extinguishment at law without a. (EXTINGUISHMENT, § 1.)
REVENUE LAWS.
Of a foreign country, how far controlling. (II. 255, n. 1.)

S.

SATISFACTION. (See ACCORD AND SATISFACTION; MERGER.)
SCRIP.
Negotiability of. (See NEGOTIABLE PAPER OTHER THAN BILLS AND NOTES, § 1.)
SECURITIES.
An indorser who takes up a bill is entitled as surety to securities which the holder has received from prior parties, the debts thereby secured being fully paid. (Duncan *v.* North and South Wales Bank, 6 App. Cas. 1.)
A holder is entitled to the benefit of any securities received by an indorser, as surety for prior parties. (*Re* Jaycox, 8 N. B. R. 241.)
SETS OF BILLS.
The parts in which foreign bills are often drawn make what is called a set of bills. All the parts form but one bill. Accordingly,
Payment by the drawee of any one part of an unaccepted bill, or the accepted part of an accepted bill, to the lawful holder, extinguishes the set. (Downes *v.* Church, II. 215 and n. 1.)
An indorsement of one part by the lawful holder gives the indorsee the title to the set. (Perreira *v.* Jopp, II. 51, n. 1; Walsh *v.* Blatchley, 6 Wis. 51, n. 1.)
It is customary to accept only one part, but whether the drawee by accepting

SETS OF BILLS — *continued.*

more than one part may incur more than one obligation if the parts are improperly indorsed to distinct holders, has not been decided. (Byles, Bills, 13th ed., 395; Holdsworth *v.* Hunter, II. 50.) It is said, however, that where only one part is accepted, the drawee should not make payment except upon the surrender of the part accepted. (Byles, Bills, 13th ed., 395, citing the French Code de Commerce, art. 148.)

It is customary to indorse more than one part, and the indorser cannot be compelled to make payment except upon a surrender of all the parts indorsed by him. (Société Générale *v.* Metropolitan Bank, 27 L. T. Rep. 849; Byles, Bills, 13th ed., 395.) Nor can a holder recover without producing or accounting for the part protested. (Wells *v.* Whitehead, 15 Wend. 527.) But, it has been held, a holder who produces the protested part is entitled to recover without more, unless the indorser shows that the other parts are outstanding in the hands of a lawful holder. (Downes *v.* Church, II. 214; Foltier *v.* Scroder, 19 La. An. 17.)

An indorser who improperly indorsed two or more parts to distinct indorsees would probably be liable upon each indorsement. (Holdsworth *v.* Hunter, II. 50.)

SIGHT BILLS AND NOTES.

Must be presented for acceptance. (PRESENTMENT FOR ACCEPTANCE, § 2.)

When to be presented for payment. (PRESENTMENT FOR PAYMENT, § 5.)

Must be presented for payment to charge acceptor or maker. (ACCEPTOR AND MAKER, § 9.)

Grace allowed on sight bills. (GRACE.)

Sight notes are now the same in England as demand notes. (II. 57, n. 1.)

SIGNATURE.

Form of. (I. 145.)

SIMPLE CONTRACT.

A bill is not a. (SPECIALTY.)

SKELETON BILLS.

When filled up take effect by relation. (ACCEPTANCE, § 9; INDORSEMENT, § 5.)

Transferee of, is not affected with notice of transferor's lack of authority to fill up the blanks. (PURCHASE FOR VALUE, §§ 3 (*d*), 13 (*f*).)

SPECIAL INDORSEMENT. (INDORSEMENT, § 4.)

SPECIALTY.

COMMON LAW AND MERCANTILE SPECIALTIES.

1. The term "specialty" is applied to an instrument which becomes effective by the mere fact of its formal execution. There are two classes of specialty contracts in the English law, — common law specialties and mercantile specialties. The first class includes bonds and covenants, *i. e.*, instruments under seal; the second class includes bills and notes, and policies of insurance, and possibly other mercantile instruments.

There is a prevalent notion, traceable to an opinion given in the House of Lords in 1778, in the case of Rann *v.* Hughes, 7 T. R. 350, n., that only contracts under seal can be specialties, all other contracts, whether written or oral, being merely simple contracts. The fallacy of this notion is easily demonstrable by an examination of the resemblances between

SPECIALTY — *continued.*
bills and notes and instruments under seal, on the one hand, and the differences between bills and notes and simple contracts, on the other hand, in those points in which specialties and simple contracts most strikingly differ from each other.
The points of resemblance and difference may be considered under the following heads, namely,
I. None but parties to a bill can be parties to an action thereon.
II. A bill is treated as a specialty in pleading.
III. A bill operates as a merger of a pre-existing claim.
IV. A bill requires no consideration.
V. The law of mutual assent, as applied to simple contracts, is inapplicable to a bill.
VI. A bill is not within the purview of the section of the statute of frauds which relates to guaranties.
VII. A bill is a chattel.
VIII. A bill is extinguished in the same mode as a bond.

NONE BUT PARTIES TO A BILL CAN BE PARTIES TO AN ACTION THEREON.

2 An unnamed principal may sue, or be sued upon, a simple contract, but upon an instrument under seal, or a bill or note, no one who is not named or described as a party to the instrument can either maintain an action upon it as plaintiff (Grist *v.* Backhouse, I. 558 and n. 1);
or be charged upon it as a defendant (Siffkin *v.* Walker, II. 550 and n. 1; Kirk *v.* Blurton, II. 552, 557, n. 1), unless charged as an oral acceptor in jurisdictions where the anomaly of oral acceptances is still permitted. (II. 554, 555, n. 2.)
It is no exception to this rule that a bank or other corporation may sue, or be sued, upon a bill which bears instead of the corporation name only the name and title of its cashier or managing officer, *e. g.*, "A. B., Cashier," or "A. B., President"; for such name and title is an alternative designation of the bank or corporation. (Bank of Genesee *v.* Patchin Bank, II. 559, 563, n. 1; First Nat. Bank *v.* Hall, II. 565, 566, n. 4; Chillicothe Bank *v.* Fox, II. 564, 565, n. 1.)

A BILL IS TREATED AS A SPECIALTY IN PLEADING.

3. A declaration upon a simple contract alleges a promise by the defendant, and some act or forbearance by the plaintiff at the defendant's request, as the consideration for that promise. A count upon a bill states neither promise nor consideration, but alleges, like a count upon a covenant, simply the execution of the instrument by the defendant. (Starke *v.* Cheeseman, II. 524, 525, n. 1; Simmonds *v.* Parminter, II. 527, 531, n. 1; 2 Chitty, Pleading, 7th ed., 100 *et seq.*; and see especially Lord Holt's opinion in Clerke *v.* Martin, II. 525, 526, and II. 527, n. 1.)
4. Just as covenant is the appropriate remedy upon an instrument under seal, and assumpsit the appropriate remedy upon a simple contract, so the normal form of action upon a bill or note is a special action upon the case founded upon the custom of merchants. But the analogy between a bill and a covenant appears from the fact that, although an action of debt cannot properly be brought upon a simple contract unless the defendant has received a substantial *quid pro quo* (Langdell, Cases on Contracts, 2d ed., 1012, 1014), such action may be maintained both upon a covenant to pay

SPECIALTY — *continued.*

a sum certain, and upon a bill, even though it appear that the defendant has received no equivalent for his signature, as in the case of accommodation paper. (Sison *v.* Kidman, II. 542. The cases of Milton, II. 520, and Welch *v.* Craig, II. 532, n. 1, are in effect overruled.)

The American cases permit an action of debt by any holder against any prior party to the instrument, *e. g.*, by payee against maker or acceptor (II. 538, n. 1); by indorsee against maker or acceptor (Raborg *v.* Peyton, II. 545, 547, n. 1); by indorsee against drawer or indorser (Onondaga Bank *v.* Bates, II. 548, 549, n. 2); but the English authorities have sanctioned the use of debt only in actions between a payee and a drawer or maker (Bishop *v.* Young, II. 532, 538, n. 1); or between an indorsee and his immediate indorser. (Watkins *v.* Wake, II. 540, 542, n. 1; II. 549, n. 2.)

5. Upon principle, assumpsit ought not to lie upon a bill; but inasmuch as the courts had for a long time allowed plaintiffs to declare in assumpsit in cases where originally debt was the only remedy, it is not surprising that they should have extended the remedy by assumpsit, by the same fiction of a promise implied in law to the case of bills and notes. (II. 521.)

Even in the use of the action of assumpsit there is a contrast between cases upon bills and those upon simple contracts, a contrast explicable only by the essential difference in the nature of the two obligations. It is a general rule that whenever debt will lie upon a simple contract, the plaintiff may, if he prefers, declare in *indebitatus assumpsit*. But a general *indebitatus assumpsit* will not lie upon a bill or note. (Brown *v.* London, II. 523, n. 2; Welch *v.* Craig, II. 532, n. 1; Hodges *v.* Steward, I. 294.) And, of course, a bill or note will not support any of the usual money counts. (Eales *v.* Dicker, II. 539 and n. 1.) The American authorities, to the contrary (II. 539, n. 1; II. 544, n. 1), violate the most fundamental principles of pleading and evidence. (II. 539.)

A Bill is a Merger, absolute or temporary, of a Pre-existing Claim.

8. If a creditor takes from his debtor an instrument under seal on account of the debt, the debt is thereby extinguished or merged in the new security. A bill or note operates in like manner, according to the custom of merchants, as a merger of a debt for which it is given.

It is a curious fact, however, that while the decisions can be supported only upon the theory that a negotiable instrument is a specialty, the courts have not given full effect to the custom of merchants, for, although a bill may be given in full satisfaction of a debt (Sard *v.* Rhodes, II. 600, 602, n. 2), even though the debtor is the only party to it, and the security is for a smaller amount than the original debt (Sibree *v.* Tripp, II. 603, 608, n. 2; but see *contra*, II. 603, n. 2), it is yet held generally that a bill given for a debt is presumptively given only by way of conditional payment; so that if the new security is not duly honored, the creditor may renounce the security, and resort to the original debt. (Ward *v.* Evans, II. 569, 571, n. 2; Cohen *v.* Hale, II. 627, 629, n. 1.) It has been held, indeed, that a creditor may retain a dividend received in bankruptcy upon the new security, and may still prove for the old debt minus the dividend received (*Ex parte* Blackburne, II. 582); but this position seems clearly untenable.

SPECIALTY — *continued.*

This doctrine of conditional payment is not only foreign to the ideas of merchants, but it is also entirely inconsistent with the common-law principle, that a cause of action once suspended is extinguished (II. 612, n. 1; II. 615, n. 1), notwithstanding the ingenious attempt of Maule, J., in Belshaw *v.* Bush, II. 609, to prove the contrary.

In some jurisdictions a bill is presumptively a satisfaction of a pre-existing debt (II. 572, n. 2), and if there is a conflict between the laws of different jurisdictions, the law of the place of transfer governs. (Vancleef *v.* Therason, II. 630.)

A Bill bars temporarily the Action upon the Old Debt.

7. A creditor who has taken a bill on account of his debt cannot, unless the debtor has given the bill fraudulently (Stedman *v.* Gooch, II. 574), maintain any action or garnishee process upon the debt before the maturity of the bill. (Kearslake *v.* Morgan, II. 575, 578, n. 3; Belshaw *v.* Bush, II. 609, 615, n. 1; II. 629, n. 1.) But if the paper is not what it purports to be, *e. g.*, if it is counterfeit (Thomas *v.* Todd, II. 633 and n. 1), or, as it is held, if it is void for any reason (II. 633, 634, n. 1), the creditor may repudiate it altogether, and resort at once to the original debt. It seems to be settled law also that a creditor has the same privilege if he receives the notes of a broken bank. (II. 634, n. 4.) In some jurisdictions, however, the creditor must first return the repudiated bill to his debtor, but in others it is held that a creditor need not return an absolutely worthless bill. (II. 634, n. 7. See *infra*, § 9.)

Laches of Creditor in collecting the New Security.

8. If the debtor is a party to the new security as drawer or indorser, a creditor who fails to exercise the diligence necessary to charge his debtor upon the new security loses also all remedy upon the original debt (Bridges *v.* Berry, II. 584, 585, n. 2; Manwaring *v.* Harrison, II. 264);

and the rule is the same even though the bill is given only by way of collateral security for the debt. (Peacock *v.* Pursell, II. 621, 623, n. 1.)

A check taken from the drawee of a draft in payment thereof, it is held, must be presented the day it is received, or the drawer of the draft will be discharged. (Smith *v.* Miller, II. 313.) But it is difficult to see why the holder, having the option of money or a check of the drawee, does not discharge the drawer of the draft by taking the check without more. (Vernon *v.* Boverie, II. 568.)

9. If the debtor simply transfers by delivery paper negotiable in that mode, *e. g.*, bank notes, and the bank at the time of transfer is insolvent, the creditor cannot resort to the original debt unless he offers to return the paper in a reasonable time; but he need not present the paper for payment (Camidge *v.* Allenby, II. 587, 594, n. 2), nor give the usual notice of dishonor. (Henderson *v.* Appleby, II. 594, 595, n. 1.) The anomaly of this rule would have been avoided if the courts had given effect to the custom of merchants, and decided that the debt was merged absolutely in the bank note, but that the debtor impliedly warranted that the paper was redeemable at the time of transfer.

10. If a creditor is content to take in payment of his debt paper to which his debtor is not a party either as maker or holder, he might fairly enough be said to exchange the obligation of his debtor for that of other persons. (Compare Vernon *v.* Boverie, II. 568.) But, according to some decisions,

SPECIALTY — *continued.*

a creditor in such a case may sue upon the original debt the moment the new security is dishonored, without giving the debtor any notice of dishonor (Swinyard *v.* Bowes, I. 586, 587, n. 1; II. 627, n. 1);

while in other cases it has been decided the debtor can be sued only after the exercise of the measure of diligence which would be necessary to charge an indorser. (Smith *v.* Mercer, II. 623.)

Loss of the new Security.

11. No action can be maintained upon the old debt if the new security is lost or destroyed. (Crowe *v.* Clay, II. 616, 620, n. 1.)

But the rule is otherwise in the United States. (II. 620, n. 1.)

Negotiation of the new Security.

12. A creditor who has taken a bill for his debt cannot, after the dishonor of the bill, maintain an action upon the old debt unless he is the holder of the bill at the time he begins his action. (Small *v.* Jones, II. 631, 632, n. 1.)

Alteration of the new Security.

13. If the new security has been altered in such a way as to deprive the debtor of any right to sue prior parties to the instrument in the event of his taking it up, the creditor cannot resort to the original debt. (Alderson *v.* Langdale, II. 596.)

But if the alteration does not deprive the debtor of his recourse to prior parties the creditor may, it is held, proceed upon the original consideration (Atkinson *v.* Hawdon, II. 598, 600, n. 2); unless the alteration was the fraudulent act of the creditor. (II. 600, n. 2.)

A Bill or Note is valid without a Consideration.

14. It is frequently stated in the books that as between the immediate parties to a bill or note a consideration is necessary to the validity of the obligation. This notion, it is submitted, is erroneous upon principle, and also upon the authorities; for although it must be conceded that the courts have sanctioned the defense of absence of consideration in certain cases, these decisions should be regarded as anomalous exceptions to the rule that a bill, being in the nature of a specialty, is obligatory without a consideration, rather than as illustrations of the opposite doctrine, that a bill, being a simple contract, requires a consideration to support it.

15. The result of the authorities may be stated as follows: —

Bill given in Payment of a Debt.

(*a*) A person who executes or indorses to his creditor a bill or note payable at a future day, in payment of his own debt or the debt of a third person, may be sued upon the new security. (Popplewell *v.* Wilson, II. 635; Ridout *v.* Bristow, II. 642; Sowerby *v.* Butcher, II. 646; Baker *v.* Walker, II. 657, 660, n. 2; Mull *v.* Van Trees, II. 684.) The case of Nelson *v.* Serle, II. 650, which seems *contra*, is distinguishable, as the new security was not negotiable, and therefore not a specialty.

The rule is the same when the new security is payable on demand. (Childs *v.* Monins, II. 636, 638, n. 3; Currie *v.* Misa, I. 624, *semble;* Sison *v.* Kidman, II. 542; see s.c. 3 M. & Gr. 810.)

The case of Crofts *v.* Beale, II. 664, seems to be *contra*, but in that case the note was not negotiable, and has been on that ground distinguished. (Currie *v* Misa, I. 624.)

SPECIALTY — *continued.*

The maker of a note is bound to pay it also, even though the amount specified therein far exceeds his original liability. (Dean *v.* Carruth, II. 708; Worth *v.* Case, II. 711, n. 1.)

Bill given for Accommodation.

(*b*) One who has signed a bill or note for the accommodation of another may be sued by a holder to whom the party accommodated has transferred the paper, either in payment of a debt due to the holder (Cook *v.* Long, II. 656);

or merely as collateral security for such debt. (Grocers' Bank *v.* Penfield, II. 685. But see Courtney *v.* Doyle, II. 682.)

Bill given for a Debt barred by Lapse of Time or Bankruptcy.

(*c*) A creditor may sue his debtor upon a bill or note given for a debt barred by the statute of limitations. (Latouche *v.* Latouche, II. 667; Mull *v.* Van Trees, II. 684.)

Or by a discharge in bankruptcy. (Brix *v.* Braham, II. 639.)

Bill given for an Equitable Claim.

(*d*) A creditor may sue upon a bill given by a person for a liability enforceable only in a court of equity. (Latouche *v.* Latouche, II. 667, 669, n. 1.)

Bill given for a void Claim.

(*e*) A creditor may sue upon a bill or note given by a person for a claim void for illegality, *e. g.*, gaming, usury, and the like. (Oulds *v.* Harrison, I. 766, 770, n. 3; Kent *v.* Walton, II. 678.)

Bill given for Claim not enforceable under the Statute of Frauds.

(*f*) A creditor may sue upon a bill or note given by a person for a claim not otherwise enforceable because of the statute of frauds. (Jones *v.* Jones, II. 654.)

Bill given for a Consideration moving from a Stranger.

(*g*) A payee may sue a drawer or maker although the consideration received by the drawer or maker moved from a third person. (Munroe *v.* Bordier, II. 660; Horn *v.* Fuller, II. 680.)

Bills signed by successive Indorsers as Cosureties.

(*h*) If several persons successively indorse a bill or note for the accommodation of a third person, and any of them, except the person first indorsing, afterwards takes up the bill, the party so taking up the bill may sue the prior indorser or indorsers upon the bill, although to prevent circuity of action the amount recoverable will be limited to the amount due from the party sued by way of contribution. (Woodward *v.* Severance, II. 681, 682, n. 4.)

16. In none of the preceding classes of cases is it possible to find a common law consideration to support the defendant's obligation as a simple contract, but they are all consistent with the theory that a bill is a mercantile specialty.

Furthermore, the practice of declaring upon a bill without any averment of a consideration can be explained only by the fact that no consideration is necessary to create the obligation.

17. On the other hand it must be conceded that no action can be maintained by the donor against a party who executes or indorses a bill either as a gift *inter vivos*, or as a *donatio mortis causa*. (Holliday *v.* Atkinson, II. 640, 641, n. 1; Hewitt *v.* Kaye, II. 669, 671, n. 2.)

SPECIALTY — *continued.*

This exceptional doctrine was unknown in the time of Blackstone, and has been criticised by very high authority. (II. 641, n. 2.) Furthermore, this doctrine was actually, although perhaps not intentionally, disregarded in two recent cases. (Bromley *v.* Brunton, II. 671; Rolls *v.* Pearce, II. 674.)

THE DOCTRINE OF MUTUAL ASSENT AS APPLIED TO SIMPLE CONTRACTS IS INAPPLICABLE TO A BOND OR A BILL OR NOTE.

18. An offer cannot ripen into a simple contract until communicated to and accepted by the offeree, nor will the communication and acceptance be effectual unless they take place before the death of the offerer.

A bond or a bill or note differs from a simple contract in both these respects, *e. g.*, —

A bill may be delivered as an escrow, and takes effect upon the fulfilment of the condition without a delivery or communication to the payee. (II. 711, n. 1, last ¶.)

And a payee may recover upon a note, although not aware of its existence until after the maker's death. (Dean *v.* Carruth, II. 708; Worth *v.* Case, II. 711, n. 1.)

THE SECTION OF THE STATUTE OF FRAUDS RELATING TO GUARANTEES DOES NOT APPLY TO BONDS OR BILLS.

19. Neither an accommodation maker, acceptor (Casey *v.* Brabason, II. 713, 714, n. 1), drawer, or indorser (O'Donnell *v.* Smith, II. 712 and n. 1), can resist payment on the ground that his promise is to pay the debt of another, and that no consideration therefor is expressed in writing. (And see particularly Steele *v.* McKinlay, 5 App. Cas. 754, 770.)

A BILL IS A CHATTEL. (See CHATTELS.)

A BILL IS EXTINGUISHED IN THE SAME MODE AS A BOND. (See EXTINGUISHMENT, § 1.)

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Violation of, is a real defense. (DEFENSES, § 8 (*b*).)

Evasion of, bars an action by a holder for value. (PURCHASE FOR VALUE, § 6.)

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STRANGER.

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Payment by a. (PAYMENT SUPRA PROTEST; I. 832, n. 1.)

SUNDAY.

Effect of, upon time of presentment. (PRESENTMENT FOR PAYMENT, § 8.)

Effect of, upon time of notice of dishonor. (NOTICE OF DISHONOR, § 12.)

Evasion of Sunday law is a personal defense (DEFENSES, § 5), and is no bar to an action by a purchaser for value without notice. (PURCHASE FOR VALUE, § 4.)

Transfer on, is valid. (INDORSEMENT, § 3.)

SUPRA PROTEST. (See ACCEPTANCE FOR HONOR; PAYMENT SUPRA PROTEST.)

SURETY. (II. 20, n. 1. See SECURITIES.)

Is discharged by release or time given to the principal. (DEFENSES, § 5.)

Successive indorsers entitled to contribution if co-sureties. (SPECIALTY, § 15 (*h*).)

SURVIVORSHIP.

Among partners. (TRANSFER, § 13.)

SUSPENSION.

A bill is a suspension of right of action or claim for which it is given. (SPECIALTY, § 7.)

T.

TAXATION.

Where property in bills is taxable. (CHATTELS, § 8.)

TENDER.

Plea of. (ACCEPTOR AND MAKER, § 11; DRAWER AND INDORSER, § 5.)

What is legal. (FORMAL REQUISITES, §§ 11, 12.)

TIME.

Of notice. (NOTICE OF DISHONOR, §§ 7–19.)

Of presentment. (PRESENTMENT FOR ACCEPTANCE, § 2; PRESENTMENT FOR PAYMENT, §§ 2–10.)

Of payment. (ACCEPTOR AND MAKER, § 15; DRAWER AND INDORSER, § 6.)

TITLE. (See TRANSFER; PURCHASE FOR VALUE; OVERDUE PAPER, § 3.)

TRANSFER. (See also PURCHASE FOR VALUE WITHOUT NOTICE.)

WHAT BILLS AND NOTES ARE NEGOTIABLE.

1. All bills and notes payable either to order or to bearer are negotiable.

Paper payable to Bearer.

2. It was at one time held that a bill or note payable to bearer was not negotiable (Hodges *v.* Steward, I. 294; Nicholson *v.* Sedgwick, I. 295, 296, n. 2); but these cases were long since overruled in Grant *v.* Vaughan, I. 299, which has been followed generally in this country. (I. 311, n. 1.)

3. A bill payable to an inanimate object, *e. g.*, to "Bills Payable," or to "1658," is reasonably to be interpreted as a bill payable to bearer. (Mechanics' Bank *v.* Straiton, I. 574, 576, n. 3; Willets *v.* Phœnix Bank, II. 736.) The same interpretation has been given also to a bill payable to a fictitious payee (Minet *v.* Gibson, I. 419, 428, last ¶ of note); but the criticism of this view in the dissenting opinion of Eyre, C. B. (I. 421–429), seems to be well founded.

Promissory Notes.

4. The courts, under the influence of Lord Holt, maintained that only bills of exchange were negotiable, and, therefore, while it was conceded that an indorsed note was a bill of exchange as between the indorser and subsequent parties, it was held that the indorsee could acquire no title as against the maker. (Buller *v.* Crippe, I. 296.) Lord Holt's disregard of the custom of merchants led to the enactment of the statute of 3 & 4 Anne, c. IX. §§ 1–3; I. 298, by which the negotiability of promissory notes was

TRANSFER — *continued.*

completely established. This statute may be fairly regarded as declaratory. (Goodwin *v.* Robarts, II. 753, 762.)

The statute has been held to include foreign notes. (Milne *v.* Graham, I. 312.)

Words of Negotiability.

5. No bill or note is negotiable unless it is payable to order or to bearer, or contains words of like effect. (Robinson *v.* Brown, I. 313 and n. 1. See *supra*, § 3.) But corporate bonds, payable to A. or assigns, are negotiable. (II. 774, 775, n. 1; Porter *v.* Janesville, 3 Fed. Rep. 617.)

MODE OF TRANSFER.

Indorsement.

6. The title to a bill or note payable to order can regularly be transferred only by indorsement. (Prevôt *v.* Abbott, I. 331, 332, n. 1. See, however, *infra*, §§ 11, 13.)

7. A delivery, however, without indorsement, passes the beneficial interest in the instrument; the transferee may, therefore, acquire the legal title by a subsequent indorsement of the transferor, although then a bankrupt (Smith *v.* Pickering, I. 331 and n. 1), or a married woman (I. 337, n. 1), or of his representative in the event of his death. (Watkins *v.* Maule, I. 332, 337, n. 1.) Indeed, the transferee, as *cestui que trust*, may in equity compel an indorsement in such cases.

8. But a delivery without indorsement does not authorize the transferee, as agent, to write an indorsement in the name of the transferor (Harrop *v.* Fisher, I. 337), nor to convert the indorsement to his assignor into an indorsement to himself, by substituting his own name for that of his assignor. (Grimes *v.* Piersol, I. 348.)

9. A delivery without indorsement is but the assignment of an equitable interest. Accordingly, even a purchaser for value without notice acquires thereby no greater interest therein than that of his assignor (Edge *v.* Bumford, I. 339), and the position of the transferee is the same, although the bill is subsequently indorsed to him, if, before such indorsement, either the bill becomes due or he has notice of equities against his assignor. (Whistler *v.* Forster, I. 340, 345, n. 1.)

Delivery.

10. The title to paper payable to bearer, or indorsed in blank, may be transferred by delivery merely, even though there are subsequent special indorsements. (Smith *v.* Clarke, I. 315 and n. 1.)

11. A delivery without indorsement passes the title to any one who takes up a bill, whether a prior holder (Death *v.* Serwonters, I. 314; Devlin *v.* Brady, I. 328);

or a stranger taking it up for honor (Mertens *v.* Winnington, I. 886, 887, n.), irrespective of the mode of its previous transfer.

12. Subject to the qualification stated in the next section delivery is in all cases indispensable to the acquisition of the title to, and consequent right of action upon a bill or note. (Emmett *v.* Tottenham, I. 316, 319, n. 1.)

The case of Gage *v.* Kendall, I. 326 (see also I. 327, n. 3), is *contra;* but a decision in which it was held that a plaintiff might maintain an action upon a note although he had no interest in it, either legal or equitable, is too clearly erroneous to call for criticism. Furthermore, this case is no longer law in New York. (Hays *v.* Hathorn, 74 N. Y. 486.) The doctrine of

TRANSFER — *continued.*

Ord *v.* Portal, I. 316, that "an indorsement in blank conveys a joint right of action to as many as agree in suing upon the bill," is not inconsistent with the rule requiring a delivery, for in that and similar cases the possession of one was the possession of all. Robinson *v.* Crandall, I. 325, too, can be supported, the question of jurisdiction being disregarded, on the ground of a constructive delivery by the plaintiff as executor to himself in his personal capacity.

Transfer by Operation of Law.

13 In some cases a bill or note may be transferred without either indorsement or actual delivery.

Thus, by the death of the holder of a bill, the title thereto, like that of his other chattels, vests by operation of law in his representative. (Stone *v.* Rawlinson, I. 386, 389, n. 1.)

And by the same principle the negotiable paper held by a bankrupt passes to his assignee in bankruptcy (Smith *v.* DeWitts, I. 611 and n. 1), unless the paper was made for the accommodation of the bankrupt. (Wallace *v.* Hardacre, I. 392, 393, n. 2.)

And paper held by a *feme sole* vests by her marriage in her husband. (McNeilage *v.* Holloway, II. 694, 697, n. 1.)

And paper held by partners vests upon the death of any one or more of them in the survivors. (Johnson *v.* Berlizheimer, 84 Ill. 54.)

By whom the Transfer should be made.

14. Only he who has the title to a bill or note can transfer it. (For the exception in favor of a purchaser for value without notice, see PURCHASE FOR VALUE WITHOUT NOTICE, §§ 1, 3.) If the bill is held by several jointly, all must transfer, and if the transfer is by indorsement the indorsement must be in the name of all (Carvick *v.* Vickery, I. 389, 391, n. 1; Estabrook *v.* Smith, I. 396, 397, n. 2), even though they are partners (I. 397, n. 1), or executors. (I. 391, n. 1.)

But any one of several executors may indorse a note payable to their testator. (I. 391, n. 1.)

15. As the title to a bill vests by the death of its owner in his representative, the latter, and the latter only, can transfer it. (Stone *v.* Rawlinson, I. 386, 389, n. 1.)

16. On the same principle negotiable paper held by a bankrupt is transferable after the bankruptcy only by the assignee. (Smith *v.* De Witts, I. 611 and n. 1. See PURCHASE FOR VALUE, § 1.)

But this principle has no application to paper in which the bankrupt had no beneficial interest, for such paper does not pass to his assignee. (Wallace *v.* Hardacre, I. 392, 393, n. 2.)

17. Similarly the husband only can transfer negotiable paper executed to his wife after her marriage, or held by her at the time of her marriage. (Mason *v.* Morgan, I. 394, 395, n. 2; Connor *v.* Martin, I. 395, n. 2; Barlow *v.* Bishop, I. 458.)

Cotes *v.* Davis, I. 393, was decided in accordance with this principle, but the facts of the case form a very slender basis for the presumption made by the court that the wife was authorized by the husband to indorse the note in his behalf, but in her own name.

18. An infant may transfer a bill (Grey *v.* Cooper, I. 417 and n. 3), although he may of course avoid the transfer at any time before its subsequent transfer to a purchaser for value without notice.

TRANSFER — *continued.*

Transfer in Trust for the Transferor.

19. The legal title to a bill or note may be transferred to one simply to enable him to bring an action, the transferor retaining the beneficial interest. (Law *v.* Parnell, I. 320, 323, n. 1.)

And as the pledgee of a bill is intended to have the right of enforcing its payment by action, the pledge of a bill, unlike the pledge of other chattels, transfers the legal title, the pledgee holding any surplus he may recover beyond his own debt for the benefit of the pledgor. (I. 324, n. 1.)

Fraudulent and Illegal Transfers.

20. As between the immediate parties, fraud and illegality in the transfer of bills and notes are attended by the same consequences as in the transfer of other chattels.

Accordingly, a fraudulent transferee of a bill acquires a title which is good until the transferor asserts his right. (Prouty *v.* Roberts, I. 353 and n. 2.)

21. A transfer on Sunday, though unlawful, passes the title irrevocably. (I. 352, n. 3.)

But when the illegal transfer is made absolutely void, no title and no right of action passes to the transferee. (Strong *v.* Tompkins, I. 350, 352, n. 3.)

22. The indorsement of a bill, though for less than its face value after deducting the legal discount, is not a loan, but a sale. There is, therefore, no usury in such a transaction (Cram *v.* Hendricks, II. 202; USURY), and the decision in Parr *v.* Eliason, I. 455, was correct, although denied to be law in Lowes *v.* Mazzaredo, I. 473.

TRANSFEROR BY DELIVERY, OBLIGATION OF. (See INDORSER WITHOUT RECOURSE.)

A transferor by delivery cannot be charged upon the instrument, inasmuch as his name does not appear thereon (Bank of England *v.* Newman, II. 102 and n. 2); but his transfer being in effect a sale, he is responsible to his transferee and subsequent holders for the validity of the title and the genuineness of the instrument which he purports to sell. (II. 242, n. 1.)

If, however, the instrument was actually signed by the parties whose names it bears, and has not been materially altered before its transfer by the defendant, the latter, in the absence of fraud, does not guarantee that the paper is free from defenses in favor of prior parties. But the authorities on this point are conflicting. (II. 242, n. 1, last ¶.)

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USURY.
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Discount of a bill by an indorsee for less than its face value is not. (Cram *v.* Hendricks, II. 202, 205, n. 6; TRANSFER, § 22.)
Discount of an accommodation bill or note is not. (Moore *v.* Baird, I. 569, 570, n. 3. But see *contra*, Whitten *v.* Hayden, 573, 574, n. 4.)

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